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## ARTICLES WAR TORTS

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*The law of armed conflict has a built-in accountability gap. Under international law, there is no individualized remedy for civilians whose property, bodies, or lives are destroyed in war. Accountability mechanisms for civilian harms are limited to unlawful acts: Individuals who willfully target civilians or otherwise commit serious violations of international humanitarian law may be prosecuted for war crimes, and states that commit internationally wrongful acts must make reparations under the law of state responsibility. But no entity is liable for lawful but unintended harmful acts—regardless of how many or how horrifically civilians are hurt.*

*This Article proposes developing an international “war torts” regime, which would require states to pay for both lawful and unlawful acts in armed conflict that cause civilian harm. Just as tort and criminal law coexist and complement each other in domestic legal regimes, war torts and war crimes would overlap but serve different aims. Establishing war torts and creating a route to a remedy would not only increase the likelihood that victims would receive compensation, it would also create much-needed incentives for states to mitigate or reduce civilian harms. Ulti-*

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*mately, a war torts regime would further the law of armed conflict's foundational purpose of minimizing needless civilian suffering.*

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## INTRODUCTION

In August 2021, a U.S. drone strike in Afghanistan killed ten civilians, including seven children.<sup>1</sup> The Pentagon originally claimed that the strike had been necessary to prevent an attack on U.S. forces, but after a *New York Times* exposé, the Pentagon recharacterized it as a “tragic mistake.”<sup>2</sup> The subsequent internal military investigation determined—much like previous investigations into other public accidents<sup>3</sup>—that no one had acted with the requisite intentionality for a war crime and the state had complied with its international obligations.<sup>4</sup> Accordingly, no individual or entity could be held accountable under international law. After all, it was war. Accidents happen.

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<sup>1</sup> Eric Schmitt & Helene Cooper, *Pentagon Acknowledges Aug. 29 Drone Strike in Afghanistan was a Tragic Mistake that Killed 10 Civilians*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/09/17/us/politics/pentagon-drone-strike-afghanistan.html> [<https://perma.cc/ML83-YQWZ>].

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., U.S. CENT. COMMAND, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTRE IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015; INVESTIGATION AND FOLLOW-ON ACTIONS 1 (2016) [hereinafter KUNDUZ REPORT], <https://info.publicintelligence.net/CENTCOM-KunduzHospitalAttack.pdf> [<https://perma.cc/HTH4-A26T>] (deeming the strike on the Kunduz hospital the result of “a combination of human errors, compounded by process and equipment failures” that did not amount to a war crime).

<sup>4</sup> *Pentagon Press Secretary John F. Kirby and Air Force Lt. Gen. Sami D. Said Hold a Press Briefing*, U.S. DEP’T OF DEF. (Nov. 3, 2021), <https://www.defense.gov/News/Transcripts/Transcript/Article/2832634/pentagon-press-secretary-john-f-kirby-and-air>

Civilian harm is endemic to armed conflict.<sup>5</sup> Even when warring states comply with the relevant law, civilians are injured when missiles miss targets, when they are mistaken for combatants, or when they are in the wrong place at the wrong time. When such incidents garner attention, experts patiently explain to an incredulous public why the latest horror was awful but lawful.<sup>6</sup> But this status quo—where there is no individualized remedy for civilians whose property, bodies, or lives are destroyed in war<sup>7</sup>—has deeply problematic incentives and consequences.<sup>8</sup> To address this accountability gap, this Article proposes creating an international “war torts” regime, which would enable civilians to bring claims for harms incurred in armed conflicts.

In the absence of a war torts regime, it is astonishing how many foreseeable and preventable harms in armed conflict are deemed lawful accidents. For example, as detailed in Azmat Khan’s remarkable reporting, U.S. activities in Middle East conflicts have been “marked by deeply flawed intelligence, rushed and often imprecise targeting, and the deaths of thousands of civilians.”<sup>9</sup> In more than 1,300 U.S. Department of Defense (DoD) reports of civilian casualties, “[n]ot a single record provided includes a finding of wrongdoing or disciplinary action.”<sup>10</sup> In response, U.S. Central Command

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force-lt-gen-sami-d-said-hold-a-p [<https://perma.cc/F5L7-BHGE>]; *id.* (“The investigation found no violation of law, including the law of war.”).

<sup>5</sup> UNITED NATIONS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2020, at 56 (2020) (noting that 100 civilians are killed every day in ongoing armed conflicts); INT’L COMM. OF THE RED CROSS, THE PEOPLE ON WAR REPORT iii (1999) (“The fundamental shift in the character of war is illustrated by a stark statistic: in World War I, nine soldiers were killed for every civilian life lost. In today’s wars, it is estimated that 10 civilians die for every soldier or fighter killed in battle.”).

<sup>6</sup> See Brianna Rosen, *Tragic Mistakes: Breaking the Military Culture of Impunity*, JUST SEC. (Nov. 23, 2021), <https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity> [<https://perma.cc/83ES-UMY8>] (“The U.S. military has a catchphrase for this ‘tragic strike’ phenomenon: ‘lawful but awful.’”); Frédéric Mégret, *Overheard Amidst the Bombs*, OPINIOJURIS (May 28, 2021), <https://opiniojuris.org/2021/05/28/overheard-amidst-the-bombs> [<https://perma.cc/F6CX-F27X>] (exemplifying this dynamic).

<sup>7</sup> E.g., GANESH SITARAMAN, THE COUNTERINSURGENT’S CONSTITUTION 51 (2012) (“Civilians harmed under collateral damage therefore have no legal recourse—they have no right to compensation or other remedies for their losses.”).

<sup>8</sup> Cf. Anand Gopal, *America’s War on Syrian Civilians*, NEW YORKER (Dec. 14, 2020), <https://www.newyorker.com/magazine/2020/12/21/americas-war-on-syrian-civilians> [<https://perma.cc/CT2A-BRGX>] (noting how the acts of American and Russian armies, operating with differing levels of adherence to the laws of armed conflict, had similarly devastating effects on civilians, and concluding with a plea to increase accountability for both lawful and unlawful wartime acts).

<sup>9</sup> Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html> [<https://perma.cc/2NGT-8UZC>].

<sup>10</sup> *Id.*

spokesman Captain Bill Urban observed, “An honest mistake . . . that results in civilian casualties, is not, in and of itself, a cause for disciplinary actions as set forth in the law of armed conflict.”<sup>11</sup> But, in the absence of accountability for accidents, “lessons [are] rarely learned” and “breakdowns of intelligence and surveillance occur again and again.”<sup>12</sup>

Not only is accidental harm in armed conflict lawful, but the law of war also explicitly permits certain types of foreseeable civilian harm.<sup>13</sup> Per the proportionality requirement, while *intentionally* targeting civilians is strictly forbidden,<sup>14</sup> an attack that *incidentally* results in civilian harm may be permissible.<sup>15</sup> Before authorizing an attack, a commander must assess whether the anticipated “collateral damage”<sup>16</sup> (the civilian deaths, civilian injury, destruction of civilian objects, and the associated reverberating effects) of a strike would be excessive relative to the expected military advantage.<sup>17</sup> If the attack

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* In January 2022, the U.S. DoD announced that it would overhaul internal procedures to better protect civilians. While undoubtedly a move in the right direction, it is unclear what form this will take or how effective these internal changes will be. See Eric Schmitt, Charlie Savage & Azmat Khan, *Austin Orders U.S. Military to Step Up Efforts to Prevent Civilian Harm*, N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/2022/01/27/us/politics/us-airstrikes-rand-report.html> [<https://perma.cc/3QES-LHHD>] (stating that the military will “strengthen its efforts to prevent civilian deaths,” but it remains unclear whether the “effort will transform the military’s ability to monitor and restrain itself”).

<sup>13</sup> I use the terms “international humanitarian law,” “law of armed conflict,” and “law of war” interchangeably to refer to states’ legal obligations in armed conflict.

<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 48, 51(2), 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Additional Protocol] (codifying the distinction between civilians and combatants); *Rule 1. The Principle of Distinction Between Civilians and Combatants*, INT’L COMM. OF THE RED CROSS CUSTOMARY INT’L HUMANITARIAN L. DATABASE [hereinafter *Rule 1*], [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1) [<https://perma.cc/64SU-VKLC>].

<sup>15</sup> First Additional Protocol, *supra* note 14, art. 51(5)(b); *Rule 14. Proportionality in Attack*, INT’L COMM. OF THE RED CROSS CUSTOMARY INT’L HUMANITARIAN L. DATABASE [hereinafter *Rule 14*], [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14) [<https://perma.cc/5XMZ-7VCC>].

<sup>16</sup> See W. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, 8 INTERCULTURAL HUM. RTS. L. REV. 1, 9 (2013) [hereinafter Reisman, *Compensating*] (noting that “collateral damage” is a euphemism for “killing and injuring noncombatant men, women and children and destroying their property”).

<sup>17</sup> First Additional Protocol, *supra* note 14, art. 51(5)(b); *Rule 14*, *supra* note 15; see also Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INT’L L. STUD. 160, 174–75 (2020) (discussing how the proportionality requirement is “under strain” due to various attempts to expand what counts as civilian harm and military advantage); Yehuda Amichai, *The Diameter of the Bomb*, ALL POETRY, <https://allpoetry.com/The-Diameter-Of-The-Bomb> [<https://perma.cc/B8H8-XJSX>] (highlighting the range of civilian harm associated with a single bombing). As these assessments often entail weighing unquantifiable apples against unquantifiable oranges, many are concerned that the calculation implicitly encourages commanders to

satisfies this proportionality evaluation and other targeting requirements, based on what the commander knows at the time of approval, it is not unlawful—regardless of how extensive or disproportionate the civilian harms actually are after the attack occurs.<sup>18</sup> Take the 2015 coalition strike on an ISIS bomb factory, which reportedly damaged 6,000 homes and over 1,000 businesses, wounded 500 people, and killed at least 85 civilians<sup>19</sup>—a seemingly excessive result, given the military objective. But under U.S. methodology, secondary explosions aren't factored into the proportionality analysis, allowing the Chief of Targets for U.S. Central Command to maintain, "This was a perfectly accurate [collateral damage estimate] call."<sup>20</sup>

To the extent there are international accountability mechanisms for civilian harms in armed conflict, they are limited to unlawful acts: Individuals who commit serious violations of international humanitarian law may be prosecuted for war crimes, and states that violate their international legal obligations "must make full reparation" to other states for resulting losses.<sup>21</sup> But under these regimes, most unin-

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undervalue foreign civilian harms. See AMICHAI COHEN & DAVID ZLOTOGORSKI, PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: CONSEQUENCES, PRECAUTIONS, AND PROCEDURES 170 (2021) (finding a lack of consensus among experts regarding "the value of collateral damage allowed when attacking a specific military target"); *see also* Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 517–19 (2014) (discussing a study which found that participants' willingness to tolerate risk increased when risks accrued to an "out-group," and that the discrepancy between in-and out-groups was particularly strong when the risks were possibly lethal).

<sup>18</sup> See Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPP. L. REV. 419, 421 (2015) ("[P]roportionality is a rule that, perhaps more than any other [law of armed conflict] rule, exposes the brutal reality of war.").

<sup>19</sup> Nick Turse, *U.S. Didn't Expect Major Explosions When an ISIS Bomb Factory Was Bombed*, THE INTERCEPT (Apr. 8, 2022), <https://theintercept.com/2022/04/08/isis-bomb-factory-iraq-pentagon-airstrike> [<https://perma.cc/ZHR8-ZZHD>].

<sup>20</sup> U.S. Central Command argued that this assessment was justified because no one "could have predicted the magnitude of the explosion and [secondary] effects in the surrounding neighborhood." *Id.* That assessment is contested. *Id.*

<sup>21</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (establishing the International Criminal Court and the standards for charging individuals with serious violations of international humanitarian law); G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 31(1) (Jan. 28, 2002) [hereinafter Draft Articles] ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Reparations Judgment, 2022 I.C.J. 116 (Feb. 9) [hereinafter Armed Activities], <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf> [<https://perma.cc/6JJ5-CCDR>] (awarding the DRC \$325 million in total compensation for Uganda's violations of international human rights law, international humanitarian law, and other international law); G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights

tended harms are not unlawful.<sup>22</sup> Collectively, the absence of consequences for civilian harm furthers the painful reality of war.<sup>23</sup> And regardless of whether a state act causing civilian harm was lawful or not, injured civilians generally have no right to individualized compensation.<sup>24</sup>

In response to this accountability gap, militaries and their advisors,<sup>25</sup> civilian advocates,<sup>26</sup> and political scientists<sup>27</sup> have long made moral and strategic arguments for voluntarily providing amends to harmed civilians. Legal scholars have also proposed various accountability-expanding moves. Some are identifying how extant international rules might be interpreted to require states to provide

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Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006) (a non-binding statement urging states to assist victims who are harmed by unlawful conduct).

<sup>22</sup> I use the term “unintended” to emphasize that these acts lack the requisite mens rea for a war crime, *see infra* Section I.B.1, but “undesired” might better capture the fact that lawful acts may result in both expected (and thus intended) and unexpected (and thus unintended) civilian harms.

<sup>23</sup> Cf. Eliav Lieblich, *The Facilitative Function of Jus in Bello*, 30 EUR. J. INT’L L. 321, 328 (2019) (reviewing ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* (2017)) (arguing that international humanitarian law may facilitate war and that emphasizing its formal prohibitory aspects “might sanitize and normalize the grave reality that it regulates”).

<sup>24</sup> There are, of course, domestic accountability regimes and a host of extralegal consequences for causing civilian harm: States risk international opprobrium, strategic setbacks, and having set dangerous precedent; individuals bear moral scars and may be subject to domestic disciplinary action. This Article is concerned with the lack of international legal accountability for civilian harms.

<sup>25</sup> Memorandum from James H. Anderson, Performing the Duties of the Deputy Under Secretary of Defense (Policy), to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combatant Commands, and General Counsel of the Department of Defense, Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations (Jan. 31, 2020) [hereinafter DoD Memo on Civilian Harm] (on file with author) (making moral and strategic arguments for voluntarily providing amends to harmed civilians as one of many areas of potential future improvement in reducing civilian harm); LARRY LEWIS, JOINT AND COAL. OPERATIONAL ANALYSIS (JCOA), REDUCING AND MITIGATING CIVILIAN CASUALTIES: ENDURING LESSONS 8 (2013) (making strategic arguments); CHRISTOPHER D. KOLENDA, RACHEL REID, CHRIS ROGERS & MARTE RETZIUS, OPEN SOC’Y FOUNDS., THE STRATEGIC COSTS OF CIVILIAN HARM: APPLYING LESSONS FROM AFGHANISTAN TO CURRENT AND FUTURE CONFLICTS 32–33 (2016) (making moral and strategic arguments).

<sup>26</sup> E.g., CTR. FOR CIVILIANS IN CONFLICT & COLUMBIA L. SCH. HUM. RTS. INST., IN SEARCH OF ANSWERS: U.S. MILITARY INVESTIGATIONS AND CIVILIAN HARM 41 (2020) [hereinafter IN SEARCH OF ANSWERS] (making moral arguments for voluntarily providing amends to harmed civilians); Scott T. Paul, *The Duty to Make Amends to Victims of Armed Conflict*, 22 TUL. J. INT’L & COMP. L. 87 (2013) (same).

<sup>27</sup> E.g., NETA C. CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA’S POST-9/11 WARS 305–85 (2013) (making moral and strategic arguments for voluntarily providing amends to harmed civilians and for vesting moral responsibility for civilian harm in armed conflict with institutions, rather than individuals).

compensation for unintended civilian harms,<sup>28</sup> including promoting broader understandings of the mens rea required for international criminal liability.<sup>29</sup> Others are suggesting that we create, protect, or expand domestic causes of action permitting suits against states for wartime wrongs.<sup>30</sup> Still others have focused on how we might improve voluntary amends mechanisms, with an eye to building shared international norms.<sup>31</sup> Moral and strategic arguments are persuasive, incremental legal tweaks would be useful, and norm-building is prudent. But these approaches do not address the full scope of the issue. The accountability gap for civilian harms is built into the structure of the law of armed conflict. A structural change is needed to close it.

This Article proposes creating an international “war torts” regime to require states to pay civilian harms in armed conflict—including those that result from intended harms, collateral damage, and accidents.<sup>32</sup> Rather than claiming that existing law (in interna-

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<sup>28</sup> E.g., Asaf Lubin, *The Reasonable Intelligence Agency*, 47 YALE J. INT'L L. 119 (2022) (arguing that states should be held liable for unreasonably faulty intelligence); Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181 (2009) (evaluating whether state liability for civilian harms can be read into the law of state responsibility); Marcus Schulzke & Amanda Courtney Carroll, *Corrective Justice for the Civilian Victims of War: Compensation and the Right to Life*, 21 J. INT. RELS. & DEV. 372 (2018) (arguing that the right not to be arbitrarily deprived of life entails a second-order duty for states to compensate civilians who have been killed); *see also* SUSAN BREAU & RACHEL JOYCE, DISCUSSION PAPER: THE LEGAL OBLIGATION TO RECORD CIVILIAN CASUALTIES OF ARMED CONFLICT 1–2 (2011), <https://www.files.ethz.ch/isn/138979/1st%20legal%20report%20formatted%20FINAL.pdf> [<https://perma.cc/59FZ-MMD6>] (arguing for recognizing an international legal obligation to investigate and document civilian casualties).

<sup>29</sup> E.g., Marta Bo, *Autonomous Weapons and the Responsibility Gap in Light of the Mens Rea of the War Crime of Attacking Civilians in the ICC Statute*, 19 J. INT'L CRIM. JUST. 275, 285–93 (2021) (arguing for an expansive interpretation of the Rome Statute's mens rea requirement to create criminal liability for indiscriminate attacks); Tetyana (Tanya) Krupiy, *Regulating a Game Changer: Using a Distributed Approach to Develop an Accountability Framework for Lethal Autonomous Weapon Systems*, 50 GEO. J. INT'L L. 45 (2018) (suggesting command responsibility be based on authority, rather than intent).

<sup>30</sup> E.g., Haim Abraham, *Tort Liability for Belligerent Wrongs*, 39 OXFORD J. LEG. STUD. 808, 809 (2019) [hereinafter Abraham, *Belligerent Wrongs*] (arguing that “belligerent wrongs can and should be corrected through ordinary domestic tort law”); Michael H. LeRoy, *The New Wages of War—Devaluing Death and Injury: Conceptualizing Duty and Employment in Combat Zones*, 22 STAN. L. & POL'Y REV. 217 (2011) (discussing how combatant and civilian employee losses in war zones should be compensated under U.S. law).

<sup>31</sup> E.g., Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT'L L. 375 (2019) (comparing U.S. and Israeli compensation programs and providing guidelines for future state compensatory mechanisms in asymmetric conflicts); Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT'L L. 121, 137 (2017); *id.* at 169 n.312 (citing other scholars writing on how to improve the amends process).

<sup>32</sup> In an earlier work, I floated the concept of “war torts” as a way to conceptualize state liability for the acts of autonomous weapon systems. Rebecca Crotof, *War Torts:*

tional law parlance, the *lex lata*) requires states to compensate harmed civilians, I argue that establishing an entirely new international legal obligation (*lex ferenda*) would be a justified and beneficial addition to the international legal order. A few legal scholars have suggested that states may have an obligation to compensate innocent victims, but these statements tend to be conclusory and underdeveloped.<sup>33</sup> In contrast, this work makes a doctrinal argument for holding states accountable.

While ambitious, this proposal is intuitive and sensible: Why shouldn't states incur obligations to recompense those they harm? Just as tort, criminal, and administrative law overlap but serve different aims in domestic legal regimes, war torts, war crimes, and the law of state responsibility could coexist and complement each other in the international legal order. Doctrinally, creating a war torts regime flows from existing international humanitarian law principles and would foster legal evolution and harmonization. Substantively, creating a war torts regime would help achieve international humanitarian law's goal of minimizing needless civilian suffering. Functionally, creating a war torts regime would increase the likelihood that individual victims receive compensation; it would also increase our understanding of the sources and scope of civilian harms, which might indirectly encourage systemic change.

This project is realistic as well as radical. I begin with the assumption that states will continue to engage in armed conflict and will continue to intentionally, incidentally, and inadvertently harm civilians. Creating a war torts regime would not alter a state's or an individual combatant's range of lawful actions in armed conflict;<sup>34</sup> instead, it would provide a theoretically and normatively sound solution to international humanitarian law's accountability gap.

The first half of this Article describes the practical and legal sources of the accountability gap. It outlines the varied causes of civilian harms and details how current accountability mechanisms—

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*Accountability for Autonomous Weapons*, 164 U. PA. L. REV. 1347 (2016) [hereinafter Crootof, *Accountability for Autonomous Weapons*]. In contrast, this Article takes a victim-based approach to argue for state liability for all civilian harms in armed conflict.

<sup>33</sup> E.g., Dieter Fleck, *Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 171, 180 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007) (arguing that “[r]eparation should not be limited to violations of international humanitarian law, but include adequate redress for victims of collateral damage”); Reisman, *Compensating*, *supra* note 16, at 4 (arguing that harmed civilians are entitled to direct remedies); W. Michael Reisman, Comment, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 398 (1997) [hereinafter Reisman, *Qana*] (same).

<sup>34</sup> Cf. Wexler & Robbennolt, *supra* note 31, at 167–69 (making a similar claim in the context of arguing for a more comprehensive amends mechanism).

including individual criminal liability, individual tort liability, the law of state responsibility, state liability in domestic courts, and *ex gratia* payments—are inadequate.

The second half argues for establishing a war torts regime. This Part discusses doctrinal justifications, including the humanitarian obligation to minimize needless civilian suffering and the broader international law obligation to provide compensation for caused harm; introduces the essential characteristics of an ideal war torts regime; and identifies potential indirect benefits, including facilitating civilian harm reduction, fostering legal evolution, and enabling greater state accountability for harmful acts. It then acknowledges assorted critiques, including that tort law is ill-equipped to address the types and scope of harms in war, the concern that “tortifying” war would over-deter states, the converse concern that allowing states to “price” civilian harms would legitimize causing them, the worry that a war torts regime would unfairly benefit some states at the expense of others, as well as the realist critique that states have few incentives to create costs for currently costless acts. It closes with an acknowledgement of questions left unresolved by these theoretical arguments: namely, the practical questions of how best to design a war torts regime, which I address in subsequent work.<sup>35</sup>

“Accidents happen” is an insipid and insufficient response to civilian suffering in armed conflict. Domestic law has long recognized that justice often requires a tort remedy; it is past time for international law to do so as well.

## I AN INHERENT ACCOUNTABILITY GAP

One of international humanitarian law’s foundational goals is to minimize needless civilian suffering—an aim operationalized in various customary international law and treaty law requirements and prohibitions.<sup>36</sup> Most of these rules, however, focus on minimizing civilian harm before it occurs; there is often no accountability afterward. The few accountability mechanisms that do exist—namely, international criminal law, the law of state responsibility, and domestic law—generally focus on punishing prohibited acts. They are not designed nor intended to ensure that individual victims are compensated. As a result, regardless of whether a harmful act is lawful or unlawful, innocent civilians almost always bear the losses.

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<sup>35</sup> See generally Rebecca Crootof, *Implementing War Torts*, 63 VA. J. INT’L L. (forthcoming 2023) [hereinafter Crootof, *Implementing War Torts*].

<sup>36</sup> See *infra* notes 200–02 and accompanying text.

### A. Civilian Harm

Civilian harms can be categorized along a spectrum of intentionality: There are intended civilian harms, anticipated but undesired incidental civilian harms (“collateral damage”), and accidental civilian harms.

The prohibition on intentionally harming civilians pervades modern international humanitarian law. It is the reason why parties to a conflict must distinguish between civilians and combatants; it is reiterated and elaborated in various treaties and statements of customary international law;<sup>37</sup> and its violation is a widely recognized war crime.<sup>38</sup>

In contrast, and as discussed in the remainder of this Section, both incidental and inadvertent civilian harms are accepted as inevitable consequences of armed conflict.

#### 1. Incidental Harm (“Collateral Damage”)

International humanitarian law prohibits intentionally causing civilian harm, but it permits civilian harm which is an undesired consequence of another, lawful activity. Intentionally targeting protected persons and objects—including civilians, humanitarian personnel, civilian objects, medical infrastructure, and cultural property—is prohibited, but all unlawful targets may become incidental “collateral damage.”<sup>39</sup> Intentionally terrorizing the civilian population is forbidden,<sup>40</sup> but it is permissible to inadvertently terrorize them when engaging in other military activities.<sup>41</sup> Intentionally starving civilians is verboten;<sup>42</sup> however, it may be legal if it is a side effect of a siege, blockade, or embargo.<sup>43</sup>

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<sup>37</sup> E.g., First Additional Protocol, *supra* note 14; Rule 1, *supra* note 14.

<sup>38</sup> E.g., Rome Statute, *supra* note 21, art. 8(2)(b)(i).

<sup>39</sup> See *supra* notes 14–20 and accompanying text.

<sup>40</sup> First Additional Protocol, *supra* note 14, art. 51(2); Rule 2. *Violence Aimed at Spreading Terror Among the Civilian Population*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule2](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2) [<https://perma.cc/Q783-V2JE>].

<sup>41</sup> Cf. Eliav Lieblich, *Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law*, in *APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS* 185 (Derek Jinks, Jackson Nyamuya Maogoto & Solon Solomon eds., 2014) (arguing that incidental mental harm should be included in proportionality analyses).

<sup>42</sup> First Additional Protocol, *supra* note 14, art. 54(1); Rule 53. *Starvation as a Method of Warfare*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE [hereinafter Rule 53], [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule53) [<https://perma.cc/493N-FEBC>].

<sup>43</sup> Rule 53, *supra* note 42. But see Tom Dannenbaum, *Encirclement, Deprivation, and Humanity: Revising the San Remo Manual Provisions on Blockade*, 97 INT'L L. STUD. 307,

It's not fair or appropriate to think of these distinctions as loopholes. Rather, the rules distinguishing intentional and incidental harms attempt to minimize gratuitous civilian harm while recognizing the tradeoffs inherent to armed conflict.

Still, a legal system that regularly permits incidentally what it prohibits instrumentally may operate to "facilitate[] rather than restrain[] wartime violence."<sup>44</sup> Consider the precision paradox.<sup>45</sup> A state's efforts to increase precision-at-a-distance are driven by the commendable and strategic desire to simultaneously minimize risks to its troops and to civilians in the conflict zone. Presumably, the more precise a strike, the less likely it is to cause either anticipated or unanticipated collateral damage.<sup>46</sup> During the U.S. Gulf War, for example, precision-guided bombs were celebrated for being able to target objects as small as a single tank or helicopter<sup>47</sup>—a far cry from World War I, when aerial bombardment technology was so imprecise that "cities were bombed because they were big enough to be hit."<sup>48</sup> But the ability to engage in more precise strikes may mean that a military can lawfully engage in more strikes overall, as an operation that might have once risked too much civilian harm and thus failed the proportionality requirement may be rendered newly lawful.<sup>49</sup> As Yoram Dinstein has noted, "When a sledgehammer is excluded by [the law of armed conflict] owing to the expectation of 'excessive' injury/damage to civilians/civilian objects compared to the anticipated military advantage . . . the availability of a scalpel may open the legal door for

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311 (2021) (arguing that "a permissive posture on starvation blockades" is morally and legally indefensible).

<sup>44</sup> Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 50 (1994); see also Lieblich, *supra* note 23.

<sup>45</sup> Cf. Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445, 446 (2005) (discussing the distinction between "precision" and "accuracy").

<sup>46</sup> See *id.* at 453 (arguing that precision strikes will increase odds that the right target is hit, decrease the size of the strike, and limit the need for restrikes). But see Maja Zehfuss, *Targeting: Precision and the Production of Ethics*, 17 EUR. J. INT'L RELS. 543, 547–50 (2010) (questioning the reality of this assessment); CARL CONETTA, PROJ. DEF. ALTERNATIVES, *DISAPPEARING THE DEAD: IRAQ, AFGHANISTAN, AND THE IDEA OF A "NEW WARFARE"* 26 (2004) ("Not many practices in civilian life that routinely missed their mark by 20 to 40 feet would be considered 'precise'—and especially not those involving the use of hundreds or thousands of pounds of high-explosives.").

<sup>47</sup> E.g., Malcolm W. Browne, *Invention that Shaped the Gulf War: The Laser-Guided Bomb*, N.Y. TIMES (Feb. 26, 1991), <https://www.nytimes.com/1991/02/26/science/invention-that-shaped-the-gulf-war-the-laser-guided-bomb.html> [<https://perma.cc/XNE9-M3S2>].

<sup>48</sup> Zehfuss, *supra* note 46, at 545.

<sup>49</sup> See Schmitt, *supra* note 45, at 453 ("[G]reater precision enables targets to be attacked that previously were off-limits due to likely excessive collateral damage or incidental injury.").

an attack at a lawful target.”<sup>50</sup> Although it is impossible to determine empirically whether there is a net increase in civilian harm due to increasingly precise weaponry,<sup>51</sup> it is reasonable to assume that as more attacks become lawful, more attacks will occur.<sup>52</sup> The more attacks, the more opportunities for both anticipated and unanticipated collateral damage—or for something else to go wrong.

## 2. Accidental Harm

Militaries attempt to minimize accidents, but per the most powerful of natural laws, if something can go wrong, it will.<sup>53</sup> There are multiple sources of accidental civilian harm in armed conflict, which can be grouped roughly into four, nonexclusive categories—equipment error, user error, data error, and communications error—and which all risk conflict escalation, friendly fire, and civilian harm.<sup>54</sup>

Equipment errors arise when something malfunctions or operates in an unexpected manner.<sup>55</sup> Take the 2007 South African military exercise, where a software glitch was suspected to have resulted in an antiaircraft cannon malfunction that killed nine soldiers and wounded fourteen others.<sup>56</sup> And the more complicated military systems become, the greater the likelihood of equipment error. As predicted by “normal accident” theory, accidents in complex and tightly coupled systems are inevitable over a long enough time horizon—not only are

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<sup>50</sup> YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 169 (3d ed. 2016).

<sup>51</sup> Cf. Jacqueline L. Hazelton, *Drones Are the New Face of U.S. Foreign Policy. What Good Are They?*, LAWFARE (July 23, 2017), <https://www.lawfareblog.com/drones-are-new-face-us-foreign-policy-what-good-are-they> [https://perma.cc/JM4D-DSSJ] (discussing the difficulty of weighing the first- and second-order harms associated with the U.S. drone counterterrorism policy).

<sup>52</sup> See Khan, *supra* note 9 (quoting Lawrence Lewis, former Pentagon and State Department adviser, as saying, “We develop all these capabilities, but we don’t use them to buy down risk for civilians. We just use them so we can make attacks that maybe we couldn’t do before.”); Schmitt, *supra* note 45, at 453 (“[O]pening additional targets to attack results in a net increase in potential harm to the civilian population.”).

<sup>53</sup> *Murphy’s Law*, DICTIONARY.COM, <https://www.dictionary.com/browse/murphy-s-law> [https://perma.cc/2DFE-8J9Q].

<sup>54</sup> For the purpose of a legal analysis, sources of accidental harms might be further divided into “honest” or “dishonest” mistakes (based on the subjective belief of the entity using force) and “reasonable” or “unreasonable” mistakes (based on some objective standard). Marko Milanovic, *Mistakes of Fact When Using Lethal Force in International Law: Part I*, EJIL: TALK! (Jan. 14, 2020), <https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i> [https://perma.cc/9D3U-6CUT]. The legal implications of these distinctions are discussed below. See *infra* notes 93, 136, 165.

<sup>55</sup> Some unpredictable action may be due to unanticipated usage or environmental interactions; some may be due to adversarial interference.

<sup>56</sup> Noah Shachtman, *Robot Cannon Kills 9, Wounds 14*, WIRED (Oct. 10, 2007, 9:00 AM), <https://www.wired.com/2007/10/robot-cannon-ki> [https://perma.cc/2754-7L3Z].

these systems subject to familiar defects, unforeseen interactions between elements within the system may create or compound discrete failures.<sup>57</sup>

User errors occur due to inadequate training, the stress of attempting a difficult task in a high-pressure environment, or other human frailty.<sup>58</sup> In 2001, for example, because someone entered one digit of a target's coordinates incorrectly, a 2,000-pound guided U.S. bomb missed its target by more than a mile. Instead of hitting a military helicopter at an airport, the bomb landed in a residential neighborhood, destroying four houses, killing at least four civilians, and injuring at least eight more.<sup>59</sup>

Data errors—which cause warfighters to make decisions based on incomplete or inaccurate information—have contributed to accidents that have resulted in civilian harm,<sup>60</sup> property damage,<sup>61</sup> and friendly fire deaths.<sup>62</sup> Some data errors arise due to inaccurate data entry; others are more systemic, and are the result of poor selection parame-

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<sup>57</sup> CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES 5 (1999).

<sup>58</sup> See Shannon E. French & Lisa N. Lindsay, *Artificial Intelligence in Military Decision-Making: Avoiding Ethical and Strategic Perils with an Option-Generator Model*, in 8 EMERGING MILITARY TECHNOLOGIES: ETHICAL AND LEGAL PERSPECTIVES 53, 53–54 (Bernhard Koch & Richard Schoonhoven eds., 2022) (summarizing arguments, based on assessments of human weaknesses, for delegating military decision-making to algorithms); Lena Trabucco & Kevin Jon Heller, *Beyond the Ban: Comparing the Ability of Autonomous Weapon Systems and Human Soldiers to Comply with IHL*, 46 FLETCHER F. WORLD AFFS. (forthcoming 2022) (manuscript at 7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4089315](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089315) [https://perma.cc/J6X3-5SMH] (noting that misidentifications and other human cognition errors cause roughly eighty to eighty-five percent of military accidents, due to noise, heat, time pressure, sleep loss, performance pressure, and stress).

<sup>59</sup> Matt Kelley, *U.S. Bomb Misses Target near Afghan Capital, Pentagon Says*, ASSOCIATED PRESS (Oct. 13, 2001).

<sup>60</sup> See, e.g., Khan, *supra* note 9 (reporting on a U.S. strike in Syria based on flawed intelligence which killed ten civilians); Zehfuss, *supra* note 46, at 549–50 (discussing the 1991 Gulf War Al Firdos bunker bombing, where intelligence errors caused the unanticipated deaths of over 200 civilians).

<sup>61</sup> See, e.g., Letter from Captain, United States Navy, to Commander, United States Seventh Fleet, Command Investigation into the Grounding of USS Guardian (MCM 5) on Tubbataha Reef, Republic of the Philippines that Occurred on 17 January 2013 (Mar. 11, 2013), <https://www.jag.navy.mil/library/investigations/uss-guardian-grounding.pdf> [https://perma.cc/G5UC-874Z] (discussing how the USS *Guardian* ran aground, due in part to the crew's use of inaccurate Digital Nautical Charts, and observing that a "safety check of the CO-approved Voyage Plan would have indicated numerous dangers in the vicinity of the reefs").

<sup>62</sup> See, e.g., 'Misdirected' Airstrike Killed 18 Allied Syrian Forces, US Military Confirms, FOX NEWS (Apr. 13, 2017, 10:53 AM), <https://www.foxnews.com/world/misdirected-airstrike-killed-18-allied-syrian-forces-us-military-confirms> [https://perma.cc/5NL2-C86F] (discussing how eighteen Syrian Democratic Forces fighters were killed by allies after giving a coalition aircraft the wrong coordinates for a strike).

ters, inappropriate indicator weightings, or contextual mislabeling (sometimes due to insufficient understanding of cultural differences).<sup>63</sup> Still other data errors might be more accurately classified as intelligence failures, such as when the politicization of intelligence and desire of intelligence agents to serve the “consumer” comes at the expense of thoroughness, accuracy, and truth.<sup>64</sup> For example, Afghan warlords reportedly intentionally misidentified rivals as Taliban to increase the likelihood that coalition forces would attack them.<sup>65</sup>

Accidents involving confirmation bias might be considered either user or data error. Confirmation bias is the tendency to look for and interpret information to accord with a preexisting belief, which frequently manifests in the misidentification of civilians or friendly forces as enemy combatants<sup>66</sup> or the failure to detect civilians at all.<sup>67</sup> Sometimes confirmation bias contributes to accidents in the heat of the moment, as when—just one minute after an improvised explosive device detonated underneath one vehicle in a convoy—a U.S. sergeant misidentified four college students and their driver as the responsible parties and opened fire, killing all five.<sup>68</sup> Other times there is sufficient or even ample opportunity to cross-check and minimize the harm of inaccurate assumptions.<sup>69</sup> For example, in 2010, U.S. forces incorrectly assumed that a group of men traveling together in a convoy in the Uruzgan province were Taliban, simply because they couldn’t think of another reason for the formation; in actuality, the

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<sup>63</sup> For example, a data set labeled “combatants” might only include images of young men with beards; this would be a mislabeled set if some of the images were of civilians. An algorithm trained on that data might develop a selection parameter that results in the conclusion that all young men with beards are combatants, especially if a poor indicator weighting gives outsized import to the existence of a beard.

<sup>64</sup> Thanks to Asaf Lubin for this observation.

<sup>65</sup> See, e.g., Zehfuss, *supra* note 46, at 550.

<sup>66</sup> See, e.g., LEWIS, *supra* note 25, at 10 (stating that misidentifications were the primary cause of civilian causalities during the U.S.-led coalition’s operations in Afghanistan); LARRY LEWIS, CTR. FOR AUTONOMY & AI, REDEFINING HUMAN CONTROL: LESSONS FROM THE BATTLEFIELD FOR AUTONOMOUS WEAPONS 4 (2018), [https://www.cna.org/CNA\\_files/PDF/DOP-2018-U-017258-Final.pdf](https://www.cna.org/CNA_files/PDF/DOP-2018-U-017258-Final.pdf) [https://perma.cc/K6ZR-LW88] (finding that over half of the U.S.-caused civilian casualties in Afghanistan were the result of misidentification of civilians as lawful targets); *id.* at 67–68 (describing friendly fire incidents caused in part by misidentifications).

<sup>67</sup> See Khan, *supra* note 9 (finding that failure to detect civilians “accounted for thirty-seven percent of credible cases, and nearly three-fourths of the total civilian deaths and injuries at the sites visited by The Times”).

<sup>68</sup> See Kevin Mullaney & Mitt Regan, *One Minute in Haditha: Ethics and Non-Conscious Decision-Making*, 18 J. MIL. ETHICS 75, 75–76, 89–92 (2019).

<sup>69</sup> See, e.g., VIKI McCABE, COMING TO OUR SENSES 21–27 (2014) (describing how confirmation bias contributed to the 1988 USS *Vincennes* incident, resulting in the deaths of 290 civilians); Khan, *supra* note 9 (discussing the November 20, 2016 attack on a civilian cotton factory that was misidentified as an ISIS explosives factory).

men had decided to travel together as insurance against vehicle breakdowns.<sup>70</sup> After misinterpreting data in accordance with their false assumptions, U.S. forces fired on the convoy, killing twenty-three civilians.<sup>71</sup>

Finally, communications failures—among warring parties to a conflict, between allies, and within a military force—also contribute to accidental harms. In 2017, U.S. forces carried out an airstrike in Syria that killed thirty-eight people and injured twenty-six others,<sup>72</sup> in part because the intelligence team failed to convey to the attacking force that the targeted site was a protected religious complex.<sup>73</sup>

### 3. Cascading Failures

None of the sources of unintended civilian harm in armed conflict—proportionality assessments, equipment errors, user errors, data errors, and communication errors—operate in isolation; rather, they compound one another, sometimes leading to cascading failures.

The Kunduz strike is a painful example of how “missteps and misunderstandings at several junctures [can pave] the way for an unspeakable tragedy.”<sup>74</sup> On October 3, 2015, in the context of its ongoing war in Afghanistan, a U.S. military aircraft attacked a Trauma Centre in Kunduz operated by Médecins Sans Frontières.<sup>75</sup> Undoubtedly, there had been a preceding legal analysis concluding that the anticipated collateral damage would be acceptable and the strike lawful; undoubtedly, that legal analysis presumed the strike would be against the correct target. Immediately after the strike, the U.S. commander in Afghanistan characterized the attack as a mistake.<sup>76</sup> Six

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<sup>70</sup> CTR. FOR CIVILIANS IN CONFLICT & COLUMBIA L. SCH. HUM. RTS. INST., THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS 42 (2012).

<sup>71</sup> *Id.* As evidenced by this example, “signature strikes”—where targets are identified based on their actions, even if their identity is unknown—are particularly prone to fostering accidental civilian harms due to data errors. *Id.* at 8, 32–34.

<sup>72</sup> Hum. Rts. Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, at 11, U.N. Doc. A/HRC/36/55 (Aug. 8, 2017) [hereinafter UN Report on Syria].

<sup>73</sup> Transcript of Pentagon’s Al Jinah Investigation Media Briefing, AIRWARS (June 27, 2017), <https://airwars.org/news-and-investigations/transcript-of-al-jinah-investigation-briefing> [<https://perma.cc/9RMN-YRWC>] (recording U.S. Army Brigadier General Paul Bontrager as acknowledging that “[h]aving that information could have been relevant to the target engagement authority’s decision to strike”).

<sup>74</sup> Peter Margulies, *Centcom Report on the Kunduz Hospital Attack: Accounting for a Tragedy of Errors*, LAWFARE (May 2, 2016, 3:48 PM), <https://www.lawfareblog.com/centcom-report-kunduz-hospital-attack-accounting-tragedy-errors> [<https://perma.cc/8GPD-HVKW>].

<sup>75</sup> KUNDUZ REPORT, *supra* note 3.

<sup>76</sup> Matthew Rosenberg, *U.S. General Says Afghans Requested Airstrike that Hit Kunduz Hospital*, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/world/asia/afghanistan-kunduz-doctors-without-borders-hospital.html> [<https://perma.cc/BLJ7-74EU>]

months later, the U.S. Central Command released its investigation’s findings, which showcased the various types of errors that occurred and compounded each other.<sup>77</sup> The aircraft had not uploaded an updated “No-Strike List,” which would have identified the protected nature of the hospital; the aircraft’s satellite radio data link failed, preventing a mid-mission upload; the targeting system stopped operating correctly after the plane took evasive maneuvers, forcing the crew to rely on visual identification of the target; the crew attempted to confirm that they had the correct target by describing it to others, but the “distinctive” characteristics they noted were common to many local buildings; and the commander who approved the aerial attack did so in violation of the relevant U.S. rules of engagement.<sup>78</sup> Ultimately, the incident was deemed to be the result of a mixture of “unintentional human errors, process errors, and equipment failures.”<sup>79</sup> This combination resulted in the deaths of at least forty-two people, with over thirty others injured, and unknown long-term lethal effects.<sup>80</sup>

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Again, civilian harm is endemic to armed conflict.<sup>81</sup> As long as there are hostile engagements near civilians, there will be collateral damage. Robust training regimes, weapons review processes, and carefully crafted rules of engagement may minimize errors, but they cannot eliminate accidents.<sup>82</sup> If anything, unintended harm is even more likely in armed conflict than in other contexts, given that mili-

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(including a video recording of General John F. Campbell stating that “a hospital was mistakenly struck”).

<sup>77</sup> KUNDUZ REPORT, *supra* note 3.

<sup>78</sup> *Id.*

<sup>79</sup> Idrees Ali, *U.S. Strike on Afghan Hospital in 2015 Not a War Crime: Pentagon*, REUTERS (Apr. 29, 2016, 12:58 PM), <https://www.reuters.com/article/us-usa-afghanistan-msf-investigation/u-s-strike-on-afghan-hospital-in-2015-not-a-war-crime-pentagon-idUSKCN0XQ24T> [https://perma.cc/UC57-JAP6] (quoting General Joseph Votel, commander of U.S. Central Command).

<sup>80</sup> The hospital was the only one of its kind in the region, so its destruction deprived untold numbers of future patients of access to medical care. See *Death Toll from the MSF Hospital Attack in Kunduz Still Rising*, MÉDECINS SANS FRONTIÈRES (Oct. 23, 2015), <https://www.msf.org/afghanistan-death-toll-msf-hospital-attack-kunduz-still-rising> [https://perma.cc/SVKJ-9EFY]. The previous year, more than 22,000 patients received care and more than 5,900 surgeries were performed. *Id.*

<sup>81</sup> See Zehfuss, *supra* note 46, at 557 (“The killing of innocents is a structural possibility; it is not an aberration, something that happens when things go wrong.”).

<sup>82</sup> As exemplified by the *Challenger* space shuttle disintegration and the Three Mile Island nuclear reactor meltdown, fatal disasters occur in even the most regulated and safety-conscious industries. PAUL SCHARRE, *ARMY OF NONE: AUTONOMOUS WEAPONS AND THE FUTURE OF WAR* 25–30 (2018) (discussing these examples, among others).

tary forces are acting on incomplete information, often under time constraints or pressure, and possibly with an adversary actively attempting to sabotage their endeavors.<sup>83</sup>

Some amount of incidental and inadvertent civilian harms in armed conflict cannot be prevented regardless of how much care is taken. Some can. Regardless, when civilians are harmed, the “accident” narrative often operates to shield individuals and states from scrutiny and moral censure,<sup>84</sup> while the law shields them from responsibility.

### B. Little Individual Accountability for Civilian Harms

There are few means of holding individuals accountable for civilian harms in armed conflict. Under international criminal law, individuals may be prosecuted for serious violations of international humanitarian law—but only if they acted with sufficient intent and knowledge. Accordingly, individuals will rarely be found criminally liable for unintended harms. And, in the limited situations where criminal prosecutions are pursued and successful, there is no guarantee of victim compensation. Meanwhile, in the absence of an international tort law regime, some victims have explored suing individual defendants under domestic tort law, but a host of pleading restrictions and immunities bar most civil suits.

#### 1. International Criminal Liability

International criminal law and related domestic law create an increasingly individualized accountability regime for those who willfully commit serious violations of international humanitarian law.<sup>85</sup> It is grounded on traditional criminal law aims: to punish wrongdoers

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<sup>83</sup> *Id.* at 34.

<sup>84</sup> E.g., Lubin, *supra* note 28, at 121 (“It is common for militaries to brush incidents [involving intelligence errors that cause civilian harm] aside as unintended mistakes, incidental to the ‘fog of war.’”); Christiane Wilke, *Legal Tragedies, in TECHNOLOGIES OF HUMAN RIGHTS REPRESENTATION* 135, 152 (Alexandra S. Moore & James Dawes eds., 2022) (observing that the “language of ‘tragedy’ is consistent” across several U.S. military reports on air strikes); see also Richard Halpern, *Collateral Damage and Tragic Form*, 45 CRITICAL INQUIRY 47, 49–50 (2018); Patricia Owens, *Accidents Don’t Just Happen: The Liberal Politics of High-Technology ‘Humanitarian’ War*, 32 MILLENNIUM: J. INT’L STUD. 595, 596–600 (2003); Nicholas J. Wheeler, *Dying for ‘Enduring Freedom’: Accepting Responsibility for Civilian Casualties in the War Against Terrorism*, 16 INT’L RELS. 205, 212 (2002).

<sup>85</sup> E.g., Paola Gaeta & Abhimanyu George Jain, *Individualisation of IHL Rules Through Criminal Responsibility for War Crimes and Some (Un)Intended Consequences, in THE INDIVIDUALISATION OF WAR* (Dapo Akande, David Rodin & Jennifer Welsh eds.) (forthcoming 2022) (discussing the increasing trend of prioritizing the use of individual criminal liability—rather than the law of state responsibility—to enforce international humanitarian law).

and thereby deter others from engaging in similar acts. It is not designed or meant to create consequences for unintended civilian harms or to ensure individual victims are compensated.

### a. Individual Liability

The modern understanding of “war crimes” originated in the 1945 Nuremberg trials and has since been developed by a host of international tribunals, including the International Criminal Court (ICC).<sup>86</sup> There is general consensus that individuals may only be held liable for war crimes if they act “with intent and knowledge,”<sup>87</sup> though there is disagreement as to whether knowledge of foreseeable consequences satisfies this standard.<sup>88</sup>

Although willing to debate the scope of the mens rea standard, tribunals, authoritative interpreters, and even advocates of more expansive understandings draw the line at interpreting it to encompass acts with unforeseen consequences.<sup>89</sup> The International Criminal Tribunal for the Former Yugoslavia has repeatedly held that it is a war crime to willfully attack civilians, where “the notion of ‘willfully’ incorporates the concept of recklessness, whilst excluding mere negligence.”<sup>90</sup> Similarly, the International Committee of the Red Cross has defined “recklessness” as “the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening”

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<sup>86</sup> See Oona A. Hathaway, Paul K. Strauch, Beatrice A. Walton & Zoe A. Y. Weinberg, *What is a War Crime?*, 44 YALE J. INT'L L. 53, 62–65 (2019).

<sup>87</sup> E.g., Rome Statute, *supra* note 21, art. 30(1). Intent is defined as existing when a “person means to engage in the conduct” or “means to cause that consequence or is aware that it will occur in the ordinary course of events.” *Id.* art. 30(2). Knowledge “means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.” *Id.* art. 30(3).

<sup>88</sup> Some ICC jurisprudence and a minority of scholars suggest or explicitly argue that some version of “recklessness” might be read into the knowledge requirement, which would expand the circle of individual accountability to encompass unintended harms in certain situations. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 75–76 (3d ed. 2013); Mohamed Elewa Badar & Sara Porro, *Article 30: Mental Element*, in COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 314, 316–19 (Mark Klamberg ed., 2017) (citing cases); Bo, *supra* note 29. Other ICC jurisprudence and most scholars conclude that it cannot, as Article 30 requires that a perpetrator is aware that “a consequence *will* occur in the ordinary course of events,” which entails something more akin to certainty. Rome Statute, *supra* note 21, art. 30(3) (emphasis added); Badar & Porro, *supra*, at 318 (citing cases).

<sup>89</sup> See Bo, *supra* note 29, at 296–97.

<sup>90</sup> Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 54 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003). This reading has been repeatedly reaffirmed. E.g., Prosecutor v. Galic, Case No. IT-98-29-A, Appeals Judgement, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Judgement, ¶ 270 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008); Prosecutor v. Perišić, Case No. IT-04-81-T, Judgement, ¶ 100 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011).

and suggests that reckless action could incur criminal liability.<sup>91</sup> But the Committee distinguishes recklessness from “ordinary negligence or lack of foresight,” which occurs when one “acts without having his mind on the act or its consequences (although failing to take necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions).”<sup>92</sup> Importantly, the fact that the acting individual didn’t foresee a certain consequence will fail to satisfy the mens rea requirement for criminal liability, even if it was objectively reasonable to foresee it.<sup>93</sup>

Accordingly, regardless of how horrific the results are, strikes with unanticipated collateral damage will rarely be war crimes. Criminal liability for disproportionate strikes turns on the mental state of the commander at the time the strike was authorized, which is evaluated based on the information that a reasonable commander would have considered when deciding to approve the action.<sup>94</sup> If a reasonable commander could have believed that the anticipated collateral harm would not be excessive relative to the anticipated military advantage,<sup>95</sup> there would be no grounds for a war crimes charge.

Similarly, there is no individual criminal liability for tragic accidents. Unexpected equipment errors that cause harm cannot be the basis for a war crimes charge, as individual combatants cannot be considered reckless for using approved military technologies in accordance with their rules of engagement. While some have floated holding military technology’s designers, manufacturers, coders, and procurers directly criminally liable for malfunctions or coding bugs, these analyses also collapse at the mental element requirement.<sup>96</sup>

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<sup>91</sup> INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 994 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter ICRC COMMENTARY].

<sup>92</sup> *Id.* at 994 (citations omitted); see also KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 43 (2003) (“It may be concluded from the cases rendered by the ad hoc Tribunals that the notion ‘wilful’ includes ‘intent’ and ‘recklessness’, but excludes ordinary negligence.”).

<sup>93</sup> See Milanovic, *supra* note 54 (noting that “an *honestly held* mistake of fact would negate the mental element [for a war crimes charge] even if it was unreasonable”).

<sup>94</sup> E.g., *Galic*, Case No. IT-98-29-T, Judgement and Opinion, ¶ 58 (“In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”).

<sup>95</sup> See *supra* note 17 and accompanying text.

<sup>96</sup> See, e.g., Tim McFarland & Tim McCormack, *Mind the Gap: Can Developers of Autonomous Weapon Systems Be Liable for War Crimes?*, 90 INT’L L. STUD. 361, 380–81, 384 (2014) (discussing the obstacles to direct criminal liability for developers); Geoffrey S.

Meanwhile, given that combatants must reasonably rely on information provided by military systems, they cannot fairly be liable for accidents resulting from data or communications errors. Mistake of fact negates criminal liability<sup>97</sup>: If combatants have reason to believe a target is not a civilian, they cannot act with the requisite mental element to commit the prohibited act of targeting civilians.<sup>98</sup> Finally, while user error may result in unintended civilian harm, this will generally manifest more as “ordinary negligence”<sup>99</sup> than criminal recklessness and thus will not be grounds for liability under international criminal law.<sup>100</sup>

There are good reasons not to hold individuals criminally liable for negligent acts.<sup>101</sup> As a result, however, even under the broadest reading of the mens rea element, there will often be no individual criminal liability for strikes with unanticipated collateral damage, tragic accidents, and other wartime acts with harmful consequences.<sup>102</sup>

### b. Command Responsibility

Military commanders and civilian supervisors may be held criminally liable under the doctrine of command responsibility if they (1) exercised effective control over a subordinate, (2) knew or had reason to know of the subordinate’s actual or intended criminal acts,

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Corn, *Autonomous Weapon Systems: Managing the Inevitability of ‘Taking the Man Out of the Loop,’* in AUTONOMOUS WEAPONS SYSTEMS: LAW, ETHICS, POLICY 209, 232–33 (Nehal Bhuta, Susanne Beck, Robin Geiß, Hin-Yan Liu & Claus Kreß eds., 2016) (determining that, as currently understood, procurement officials cannot be held liable, but arguing for expanding the doctrine to establish such liability).

<sup>97</sup> Bo, *supra* note 29, at 298.

<sup>98</sup> See *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment, ¶¶ 805–08 (Mar. 7, 2014) (finding, in analyzing an allegation of unlawfully targeted civilians, that the mens rea required evidence that the defendant “must have . . . been aware” that the targets were civilians). *But see* Bo, *supra* note 29, at 291 (contending that this requirement is irreconcilable with the “lack of targeting” associated with prohibited indiscriminate attacks, even though the Rome Statute “does not expressly criminalize indiscriminate attacks as a war crime”).

<sup>99</sup> See ICRC COMMENTARY, *supra* note 91, at 994.

<sup>100</sup> *But see* Bo, *supra* note 29, at 297 (“If lack of knowledge . . . is due to a deliberate violation of the duty to take precautions and acquire the necessary knowledge about the object of the attack, the human operator can be held responsible to the extent that the violation of the duty . . . evidences the intent to hit civilians.”).

<sup>101</sup> See, e.g., Claire O. Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579, 581 (2005) (arguing that negligence “is incompatible with traditional principles of criminal responsibility”).

<sup>102</sup> Cf. Bo, *supra* note 29, at 295 (acknowledging that an expansive recklessness interpretation “is still not sufficient” to address all concerns about an accountability gap when weapons systems act unexpectedly).

and (3) failed to take necessary and reasonable measures to prevent or punish them.<sup>103</sup>

Critically, this doctrine is meant to incentivize commanders to avert or address others' serious violations of international humanitarian law;<sup>104</sup> accordingly, it has a significantly lower mens rea requirement than other war crimes. Tribunals tend to apply a standard akin to gross or culpable negligence, rather than intent or recklessness.<sup>105</sup> It does require some culpability, though: International tribunals have explicitly rejected a strict liability standard.<sup>106</sup>

Even so, invoking command responsibility will not result in anyone being held accountable for unintended civilian harms. Superiors are only responsible for failures to prevent or punish actions that would constitute chargeable criminal offenses (regardless of whether anyone is charged).<sup>107</sup> If no subordinate acts with the requisite mens rea, there is no underlying war crime to have prevented or punished and therefore no basis for command responsibility.<sup>108</sup>

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<sup>103</sup> See, e.g., Statute of the Special Court for Sierra Leone art. 6(3), Jan. 16, 2002, 2178 U.N.T.S. 38342; Rome Statute, *supra* note 21, art. 28; Statute of the International Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1598; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(3), May 25, 1993, 32 I.L.M. 1192; First Additional Protocol, *supra* note 14, arts. 86–87; see also Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, ¶ 346 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (applying the doctrine of command responsibility). For a summary of the development of this customary rule, see CASSESE, *supra* note 88, at 182–87.

<sup>104</sup> See DINSTEIN, *supra* note 50, at 307 (noting that commanders are held responsible for their “own failure to act (act of omission), rather than for the direct acts (of commission) of the subordinates”).

<sup>105</sup> See CASSESE, *supra* note 88, at 53.

<sup>106</sup> See Beatrice I. Bonafé, *Command Responsibility*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 270, 271 (Antonio Cassese ed., 2009) (“As the ad hoc tribunals have repeatedly underscored, command responsibility is not a form of strict liability.”); see also *In re Yamashita*, 327 U.S. 1, 16–17 (1946) (applying a nearly strict liability standard in holding that, although there was no direct evidence linking Yamashita to his subordinates’ crimes, he breached his duty to control, prevent, or punish their actions).

<sup>107</sup> E.g., Guenael Mettraux, *The Doctrine of Superior/Command Responsibility*, THE PEACE & JUST. INITIATIVE, <https://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility> [<https://perma.cc/S6LN-RA2G>] (“A superior may be held criminally responsible . . . where, despite his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent and punish these crimes.”).

<sup>108</sup> See Crootof, *Accountability for Autonomous Weapons*, *supra* note 32, at 1378; Heather M. Roff, *Killing in War: Responsibility, Liability and Lethal Autonomous Robots*, in ROUTLEDGE HANDBOOK OF ETHICS AND WAR: JUST WAR THEORY IN THE TWENTY-FIRST CENTURY 352, 357–58 (Fritz Allhoff, Nicholas G. Evans & Adam Henschke eds., 2013). But see Jens David Ohlin, *The Combatant’s Stance: Autonomous Weapons on the Battlefield*, 92 INT’L L. STUD. 1 (2016) (arguing that the critical element for command responsibility is control, not the subordinate’s intent—but that at least recklessness, rather than merely negligence, is required for command responsibility liability).

### c. Prosecutorial Discretion and Insufficient Compensation Mechanisms

The aim of criminal law is to uphold social norms by punishing wrongdoers—not to pursue all potential suits or to compensate the victims of those wrongs.<sup>109</sup> International and domestic prosecutors of war crimes retain discretion in determining which suits are pursued.<sup>110</sup> They may elect not to pursue a particular suit for a host of reasons, ranging from political considerations to resource constraints. When a criminal suit is pursued and successful, victims often do not have a right to compensation, let alone individualized compensation. As Judges Christine Van den Wyngaert and Howard Morrison observed,

It is emphatically not the responsibility of the International Criminal Court to ensure compensation for all those who suffer harm as a result of international crimes. We do not have the mandate, let alone the capacity and the resources, to provide this to all potential victims in the cases and situations within our jurisdiction.<sup>111</sup>

Still, in the absence of other options, many look to criminal law to provide some form of victim compensation. The few international institutions that do, however, tend to award collective (rather than individualized) damages and symbolic (rather than compensatory) amounts. For example, the Extraordinary Chambers of the Court of Cambodia awards only symbolic reparations.<sup>112</sup>

The exceptions to this general practice exemplify an additional issue with using criminal law to serve a compensatory function—namely, individual war criminals generally do not have sufficient funds to provide compensation for the damage they cause. Article 75 of the Rome Statute is unusual in that it grants the ICC the power to

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<sup>109</sup> See Bachar, *supra* note 31, at 389 (distinguishing criminal and civil actions as being focused on the culpability of the perpetrator and the harm suffered by the victim, respectively); Luke Moffett, *Reparations at the ICC: Can It Really Serve as a Model?*, JUSTICEINFO.NET (July 19, 2019), <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/41949-reparations-at-the-icc-can-it-really-serve-as-a-model.html> [https://perma.cc/C2CJ-3CEL] (discussing the limited availability of reparations for victims at the ICC).

<sup>110</sup> Rome Statute, *supra* note 21, art. 15 (granting discretion to ICC prosecutors in determining whether to initiate investigations); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 156 (2001) (noting that states may be unwilling to prosecute war criminals for evidentiary or political reasons).

<sup>111</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Van den Wyngaert & Judge Morrison, ¶ 75 (June 8, 2018).

<sup>112</sup> EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, INTERNAL RULES (REV. 8) r. 23.5(1) (2011) (“If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. . . . These benefits shall not take the form of monetary payments to Civil Parties.”).

“make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims.”<sup>113</sup> However, in each of the two times the Court has awarded individual reparations (only one of which was intended to be compensatory), the defendants’ lack of sufficient funds necessitated the Court’s request that the ICC’s Trust Fund for Victims provide the monies.<sup>114</sup>

Expanding the mens rea standard for war crimes to include recklessness or reinterpreting the command responsibility doctrine as a criminal negligence standard might permit more war crimes prosecutions, but these legal changes will do little to compensate individual victims for their losses. Victim compensation is not the province of criminal law; rather, it is a tort law principle.<sup>115</sup>

## 2. Individual Civil Liability in Domestic Courts

At present, there are no international mechanisms for holding individuals liable in tort for harms caused in armed conflict.<sup>116</sup> To the extent individual tort liability exists, it is limited to domestic law regimes. But even if claimants were able to surmount the myriad practical obstacles to identifying defendants and bringing suit, hardly any states permit domestic tort suits for claims arising from armed conflict activities. The few that do usually limit claims to harms associated with violations of international humanitarian law. Moreover, suits against domestic or foreign defendants are often subject to immunity

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<sup>113</sup> Rome Statute, *supra* note 21, art. 75.

<sup>114</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Order for Reparations Pursuant to Article 75 of the Statute, ¶¶ 306–07, 330 (Mar. 24, 2017) (awarding a symbolic \$250 to each individual victim); Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Reparations Order, ¶¶ 33, 52–54 (Aug. 17, 2017) (awarding compensatory reparations to “those whose livelihoods exclusively depended upon the Protected Buildings and . . . those whose ancestors’ burial sites were damaged in the attack”). In a third case, the ICC considered but decided against awarding individual reparations and instead awarded collective remedies. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations, ¶ 270–74 (Aug. 7, 2012), *aff’d*, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures to be Applied to Reparations” of 7 August 2012 (Mar. 3, 2015).

<sup>115</sup> Perhaps in recognition of this, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone provide that a war crimes conviction in the international tribunal can enable victims to bring suit under domestic law. Emanuela-Chiara Gillard, *Reparations for Violation of International Humanitarian Law*, 85 INT’L REV. RED CROSS 529, 545–46 (2003). However, this author was unable to locate any examples where victims did so, possibly due to the barriers enumerated in Section I.B.2.

<sup>116</sup> See, e.g., Declaration of Kenneth Howard Anderson Jr. at 46, *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2004) (No. 04-CV-00400) (“Although international law in narrow circumstances does provide for individual criminal liability, it does not generally provide for civil liability—not even for *individuals, let alone for corporations.*”).

defenses. Given these hurdles, some scholars are proposing expanding domestic individual tort liability through the creation of new causes of action or the elimination of immunities; however, even if their reforms are implemented, individual defendants will rarely have sufficiently deep pockets to provide adequate compensation.

### a. Limited Causes of Action

Some common and civil law systems create circumscribed means by which victims of unlawful acts in armed conflict may seek compensation; victims of lawful harms have no such recourse.

A handful of common law systems create causes of action for civilians who are harmed due to serious violations of international humanitarian law. The U.S. Alien Tort Claims Act, for example, allows suits for harms incurred in armed conflict when the harm arises from a “violation of the law of nations or a treaty of the United States”—though court decisions have dramatically contracted the scope of this right in recent years.<sup>117</sup>

In certain civil law systems, should the state charge an individual defendant with a war crime, affiliated victims may become parties to war crimes prosecutions (*partie civile*) and file associated claims for compensation.<sup>118</sup> However, these claimants are only awarded funds in cases where the war crime is proven—rendering the compensation claim subject to the higher standards of criminal law and its associated defenses and limitations.<sup>119</sup>

### b. Expansive Immunities

Many states have a “combatant activities exception” to domestic tort claims, which bars claimants from holding combatants liable for any losses they inflict during armed conflict.<sup>120</sup> This immunity is often

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<sup>117</sup> U.S. Alien Tort Claims Act, 28 U.S.C. § 1330 (2012). The statute’s jurisdiction has been further limited by subsequent U.S. jurisprudence. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–38 (2004) (defining what violations could be the basis for a suit); *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 125 (2013) (Kennedy, J., concurring) (limiting the applicability of the statute when the torts occur outside the United States); *Daimler AG v. Bauman*, 571 U.S. 117, 123 (2014) (requiring plaintiffs to satisfy personal jurisdiction requirements).

<sup>118</sup> Gillard, *supra* note 115, at 547.

<sup>119</sup> *Id.*; *see also* Brian L. Cox, *Belligerent Liability: Assessing Conceptual and Legal Frameworks for Compensating Victims of Armed Conflict* 43 (Mar. 31, 2022) (unpublished manuscript) (on file with author) (discussing a 2013 suit for reparations, in which a German district court found that, in the absence of a war crime or breach of an official duty, “international law does not entitle plaintiffs as individuals to claim damages sustained in the conduct of hostilities,” a holding which survived multiple appeals).

<sup>120</sup> *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346 (1948) (extending this immunity to any government employee, including contractors); Crown Liability and Proceedings

defended on the grounds that, were combatants not immune from tort liability, they would either refrain from engaging in necessary military activities or refuse to serve at all.<sup>121</sup>

Haim Abraham disputes this characterization: Based on a survey of Israeli combatants, he argues that dispensing with the combatant activities immunity would be unlikely to over-deter combatants.<sup>122</sup> He argues, first, that most combatants will not change their acts in light of the possibility of liability, as most do not feel that they have much freedom in their actions; they must follow their commanders' orders or be subject to internal accountability mechanisms.<sup>123</sup> Second, due to a combination of incomplete information and lack of expertise in assessing risk, most combatants will be unable to execute the accurate cost-benefit analysis necessary for deterrence to operate effectively.<sup>124</sup> Third, given that states will likely indemnify their forces, imposing liability is unlikely to prompt individuals to act more carefully.<sup>125</sup> Accordingly, Abraham concludes that the existence and scope of the Israeli combatant activities immunity should be reevaluated.<sup>126</sup> Currently, however, similar immunities operate to bar suits against individual combatants in many jurisdictions.<sup>127</sup>

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Act, R.S.C. 1985, c. C-50, § 8 (Can.) (precluding liability for “anything done or omitted . . . for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces”); § 5, Civil Wrongs (Liability of the State) Law, 5712–1952, LSI 6 147 (1951–52), as amended (Isr.); Crown Proceeding Act 1947, c. 44, § 10 (UK). Additionally, many of these laws also immunize the forum state for combatant activities in armed conflicts. *See infra* Section I.C.2.

<sup>121</sup> See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1, 18 (D.C. Cir. 2009); CivA 5964/92 *Jamal Kasam Bnei Odeh v. State of Israel*, 57(4) PD 1, 5 (2002) (Isr.) (stating that individuals should be exempt from tort liability for warlike actions).

<sup>122</sup> Haim Abraham, *Tort Liability, Combatant Activities, and the Question of Over-Deterrence*, LAW & SOC. INQUIRY 1, 2–3 (2021) [hereinafter Abraham, *Combatant Activities*]. Similarly, he argues that eliminating or minimizing the combatant activities exception would be unlikely to over-deter other state actors, such as politicians or government attorneys, or states more generally. *Id.* at 8.

<sup>123</sup> *See id.* at 6–7 (arguing that combatants’ discretion is “very limited” once they receive specific orders, as a refusal to follow orders leads to “the possibility that they could be held criminally or administratively liable”).

<sup>124</sup> *See id.* at 6, 8 (arguing that combatants lack information about the “various costs and benefits of combatant activities”).

<sup>125</sup> *See id.* at 6, 8. Abraham also argues that a combination of “high litigation costs, low potential compensation, and procedural hurdles” will discourage potential plaintiffs from filing claims, resulting in the state not fully internalizing the costs of the losses it creates. *Id.* at 8.

<sup>126</sup> *See id.* at 31 (arguing that the current Israeli combatant activities immunity law yields weak incentives and unduly limits potential plaintiffs’ ability to obtain tort law remedies).

<sup>127</sup> *See id.* at 2–3 (noting that the exception can be found in many common law jurisdictions, including Australia, Canada, the United Kingdom, the United States, and Israel). Even when suits were not barred by combatant activities immunity, the state secrets privilege or political question doctrines might operate to foreclose access to

### c. Judgment-Proof Defendants

Even were it possible to hold individual defendants liable in tort in all domestic systems, they probably would not possess sufficient funds to compensate victims. Individual defendants' lack of means might be addressed through new personal liability insurance packages, akin to those available to U.S. law enforcement officers,<sup>128</sup> but it seems more likely that states would indemnify their military forces and pay for the damages combatants incur.<sup>129</sup> If so, why not simply require states to pay in the first place?

### C. Little State Accountability for Civilian Harms

Extant legal regimes do not create sufficient state accountability for civilian harms in armed conflicts. Under the law of state responsibility, states are responsible for their internationally wrongful acts, but most wartime acts that result in civilian harms will not be considered "wrongful" under prevailing legal interpretations. Those that are wrongful oblige the responsible state to make reparations to the harmed state—there is no associated right to individualized compensation. Meanwhile, domestic suits against states for harms arising out of armed conflict would allow for individual awards, but most are blocked by both international and domestic immunities. And although some states voluntarily make *ex gratia* or condolence payments to civilians harmed by their military activities, the discretionary nature of these regimes renders them yet another inadequate accountability mechanism.

#### 1. State Responsibility

Like international criminal law, the law of state responsibility is not intended nor designed as an accountability mechanism for lawful-but-harmful acts in armed conflict. It clarifies when a state is responsible for a violation of international humanitarian law and describes how a responsible state might make reparations, but it establishes no private right to compensation.<sup>130</sup>

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relevant information. *Cf. Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (permitting the U.S. government to invoke the state secrets privilege in a case where it was originally not party to the suit but intervened as a party defendant).

<sup>128</sup> E.g., *Law Enforcement Liability Insurance*, TRAVELERS, <https://www.travelers.com/business-insurance/general-liability/law-enforcement> [<https://perma.cc/7PB2-8MC3>].

<sup>129</sup> Abraham, *Combatant Activities*, *supra* note 122, at 6, 8.

<sup>130</sup> International Committee of the Red Cross, *State Responsibility*, in *How DOES LAW PROTECT IN WAR?*, <https://casebook.icrc.org/law/state-responsibility> [<https://perma.cc/Q6NE-AVKK>].

Under the law of state responsibility, states are responsible for their internationally wrongful acts. What an “internationally wrongful act” is will change with the context, but it must be “an action or omission” that is “attributable to the State under international law” and “constitutes a breach of an international obligation of the State.”<sup>131</sup> In armed conflicts, that entails responsibility for violations of any number of international humanitarian law requirements.<sup>132</sup> Additionally, a state may also be responsible when a member of its armed forces acts unlawfully;<sup>133</sup> this responsibility is associated with but exists independently of an individual’s criminal liability.<sup>134</sup>

However, the low bar for compliance with international humanitarian law severely limits the likelihood that an act which causes civilian harm will be considered “internationally wrongful.” First, there will never be state responsibility for collateral damage associated with attacks that comply with the law of armed conflict.<sup>135</sup> Lawful acts are not internationally wrongful. Second, there are few international humanitarian law obligations to minimize accidental civilian

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<sup>131</sup> Draft Articles, *supra* note 21, art. 2; Wexler & Robbenolt, *supra* note 31, at 135 (“[T]he International Law Commission found the term ‘wrongful’ to be understood to mean unlawful, not simply harmful.”).

<sup>132</sup> See First Additional Protocol, *supra* note 14, art. 91 (stating that parties to a conflict that violate the Geneva Conventions or Protocol shall be liable to pay compensation); Convention with Respect to the Laws and Customs of War on Land (Hague, IV) art. 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV] (stating that parties to a conflict that violate the Hague Convention’s provisions shall be liable to pay compensation).

<sup>133</sup> States are responsible for the acts of state organs, which include members of their armed forces. E.g., *Rule 149. Responsibility for Violations of International Humanitarian Law*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE [hereinafter *Rule 149*], [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule149](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule149) [<https://perma.cc/2EJK-ETM5>] (citing sources). States may also be held responsible for the conduct of non-state actors who are *de facto* state organs, although the standard for attribution remains unresolved. For the ICJ’s “effective control” test, see *Bosn. & Herz. v. Serb. & Montenegro*, Judgment, 2007 I.C.J. 43, ¶ 400 (Feb. 26); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 109–10 (June 27) (using the phrase “complete dependence” to refer to a similar control standard). For the ICTY’s “overall control” test, see *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber, Judgement, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). Additionally, states may sometimes be held responsible for the conduct of other non-state actors—specifically, those who act “on the instructions of, or under the direction or control of” a state in carrying out an operation, or who engage in acts which the state later acknowledges and adopts as its own. Draft Articles, *supra* note 21, arts. 5, 8, 11; *see also id.* art. 8 cmts. 3, 8 (explaining that the Draft Articles adopted the higher “effective control” standard to establish attribution only for acts that occur in the context of an operation over which a state exercises effective control, and only for ultra vires actions that are an “integral part” of the operation).

<sup>134</sup> *Rule 149*, *supra* note 133.

<sup>135</sup> See *supra* Section I.A.1.

harm.<sup>136</sup> The two most relevant rules are (1) the requirement that states conduct legal reviews of weapons and (2) the feasible precautions requirement. Both requirements are easily satisfied.

### a. Weapons Review

To ensure that weapons are capable of being used in compliance with the law of armed conflict, states are required to conduct legal reviews of new and newly acquired weapons.<sup>137</sup> Part of this review entails confirming that the weapon does not run afoul of the various tech-neutral and tech-specific rules, which are intended to minimize needless civilian (and combatant) harm.<sup>138</sup> Weapons which cause unnecessary injury or suffering are prohibited,<sup>139</sup> as are weapons that cannot be directed at a military objective or whose effects cannot be controlled.<sup>140</sup> While less firmly established, weapons that “are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment” are probably unlawful.<sup>141</sup> Finally, multiple tech-specific treaties—including the Convention on Cluster Munitions, the Mine Ban Convention, and the Nuclear Weapons Ban—explicitly state that they exist in part to minimize unnecessary civilian harm.<sup>142</sup>

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<sup>136</sup> There may, however, be concurrent international human rights obligations, the violation of which may trigger the applicability of the law of state responsibility. For arguments that international humanitarian law does not necessarily displace international human rights law, see, for example, ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* 15 (2017); Oona A. Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis & Julia Spiegel, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012); Milanovic, *supra* note 54 (arguing that, under international humanitarian law, mistakes of fact must be “both honest and reasonable to exonerate the state completely”).

<sup>137</sup> This obligation is codified in the First Additional Protocol, *supra* note 14, art. 36; the obligation is also binding on all states under customary international law, see International Committee of the Red Cross, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, 88 INT'L REV. RED CROSS 931, 941 (2006).

<sup>138</sup> The more tech-neutral a rule, the more it regulates all weapons; the more tech-specific, the more it regulates only particular weapons.

<sup>139</sup> *Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule70](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70) [https://perma.cc/CQ8S-R56R].

<sup>140</sup> *Rule 71. Weapons that Are by Nature Indiscriminate*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule71](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule71) [https://perma.cc/HL32-SM96].

<sup>141</sup> *Rule 45. Causing Serious Damage to the Natural Environment*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule45](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45) [https://perma.cc/U8GW-7HN8].

<sup>142</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction pmlb., *opened for signature* Mar. 01, 1999,

But the legal review requirement can only do so much. Due to a lack of transparency and enforcement mechanisms, the majority of states have not publicly acknowledged that they comply with review obligations;<sup>143</sup> those that do have been criticized for employing procedures that allow them to easily evade the review requirement (such as characterizing weapon systems with new capabilities as minorly modified versions of approved precursors).<sup>144</sup> Most importantly, a legal review evaluates only whether a given weapon is capable of being used in compliance with international humanitarian law; it does not require that a weapon system satisfy any objective safety standards. Accordingly, even when states comply in good faith with the weapons review requirement, approved weapons may cause extensive civilian harm without triggering the law of state responsibility.<sup>145</sup>

### b. Feasible Precautions

International humanitarian law requires parties to a conflict to take feasible precautions to minimize civilian harm.<sup>146</sup> Those who “plan or decide upon an attack” must “do everything feasible” to

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2056 U.N.T.S. 211 (noting that the treaty is “[d]etermined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children”); Convention on Cluster Munitions pmbl., *opened for signature* May 30, 2008, 2688 U.N.T.S. 39 (noting that the treaty drafters are “[d]eeply concerned that civilian populations and individual civilians continue to bear the brunt of armed conflict” and “[c]oncerned that cluster munition remnants kill or maim civilians, including women and children”); Treaty on the Prohibition of Nuclear Weapons pmbl., *opened for signature* Sept. 20, 2017, 57 I.L.M. 347 (entered into force Jan. 22, 2021) (noting that the treaty drafters are “[d]eeply concerned about the catastrophic humanitarian consequences that would result from any use of nuclear weapons”).

<sup>143</sup> See James Farrant & Christopher M. Ford, *Autonomous Weapons and Weapon Reviews: The UK Second International Weapon Review Forum*, 93 INT'L L. STUD. 389, 401 (2017) (“Most States party to [the First Additional Protocol] do not complete [Article 36] weapon reviews, or they do not publicly acknowledge doing so.”).

<sup>144</sup> See, e.g., U.N. GAOR, 74th Sess., 11th–12th mtgs., U.N. Doc. GA/L/3597 (Oct. 14, 2019), <https://press.un.org/en/2019/gal3597.doc.htm> [<https://perma.cc/5B83-MMYB>] (noting that the legal review requirement “was being undermined by States failing to adhere to their international obligations, along with the selective enforcement and exploitation of existing frameworks and mechanisms”).

<sup>145</sup> As discussed above, approved weapons might unexpectedly malfunction, be unintentionally misused, or be used in strikes with collateral damage. See *supra* Section I.A.

<sup>146</sup> See, e.g., First Additional Protocol, *supra* note 14, art. 57; Rule 15. *Principle of Precautions in Attack*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule15](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15) [<https://perma.cc/4AJS-DKGN>] (“All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.”).

verify the target is lawful;<sup>147</sup> “take all feasible precautions in the choice of means and methods of attack,” including selecting the least injurious of equivalent options;<sup>148</sup> give “effective advance warning” when practicable;<sup>149</sup> and take general precautions against the possible effects of attacks.<sup>150</sup> In practice, the obligation is something more than is already legally required (insofar as that would create no additional obligations) but something far less than taking all possible measures to minimize civilian harm.<sup>151</sup>

While states are responsible for violations, the feasible precautions requirement is generally understood to apply to the commander making a targeting decision.<sup>152</sup> The requirement might also be relevant when evaluating the acts of those who gather data prior to an attack<sup>153</sup> or who implement or monitor an attack.<sup>154</sup> In 2017, for example, U.S. intelligence agents did not convey information about the protected nature of a target to the relevant commander, which U.S. General Paul Bontrager acknowledged was “a preventable error.”<sup>155</sup> A U.S. investigation determined that there had been no negligence (much less intentional or reckless action), and therefore no violation of international humanitarian law.<sup>156</sup> An independent Commission of Inquiry disagreed: It concluded that “United States forces failed to take all feasible precautions . . . in violation of international humanitarian law.”<sup>157</sup>

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<sup>147</sup> First Additional Protocol, *supra* note 14, art. 57(2)(a)(i).

<sup>148</sup> *Id.* arts. 57(2)(a)(ii), 57(3), 57(4).

<sup>149</sup> *Id.* art. 57(2)(c).

<sup>150</sup> Rule 22. *Principle of Precautions Against the Effects of Attacks*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule22](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule22) [https://perma.cc/ER4Q-VY4X].

<sup>151</sup> See Peter Margulies, *Autonomous Cyber Capabilities Below and Above the Use of Force Threshold: Balancing Proportionality and the Need for Speed*, 96 INT'L L. STUD. 394, 424 (2020).

<sup>152</sup> See, e.g., DINSTEIN, *supra* note 50, at 164–67.

<sup>153</sup> See Lubin, *supra* note 28 (discussing how the feasible precautions requirement might be applied to intelligence collection and dissemination).

<sup>154</sup> This new, extended responsibility approach may be fostered by the proliferation of increasingly autonomous weapon systems, as there is a growing recognition that their lawful use may require a different type of constant care. See, e.g., Christopher M. Ford, *Autonomous Weapons and International Law*, 69 S.C. L. REV. 413, 447–48, 451 (2017) (noting that autonomous weapon systems will require ongoing monitoring to fulfill the feasible precautions requirement, running from “the activation of the system to the [target] engagement”).

<sup>155</sup> Transcript of Pentagon’s Al Jinah Investigation Media Briefing, *supra* note 73.

<sup>156</sup> *Id.*

<sup>157</sup> UN Report on Syria, *supra* note 72, at 13. The accuracy of the Commission’s conclusion has been sharply debated by practitioners and scholars. Compare Shane Reeves & Ward Narramore, *The UNHRC Commission of Inquiry on Syria Misapplies the Law of Armed Conflict*, LAWFARE (Sept. 15, 2017), <https://www.lawfareblog.com/unhrc-commission-inquiry-syria-misapplies-law-armed-conflict> [https://perma.cc/VA6F-U2EM]

Unintended failures to take reasonable precautions may sometimes constitute an internationally wrongful act. A 1906 mistaken killing of an American officer by soldiers engaged in rifle practice could “only be viewed as an accident,” but nonetheless “[could not] be regarded as belonging to the unavoidable class whereby no responsibility is entailed.”<sup>158</sup> Although unintended, this accident violated the feasible precautions requirement because it could not “have occurred without the contributory element of lack of proper precaution on the part of those officers . . . who were in responsible charge of the rifle firing practice and who failed to stop firing [when the officer’s ship] came into the line of fire.”<sup>159</sup> Similarly, the 1999 U.S. bombing of the Chinese embassy in Belgrade could be attributed to a failure to take reasonable precautions, insofar as the embassy was mistakenly targeted because the United States checked it against long-outdated maps and lists of prohibited targets.<sup>160</sup> The Chinese emphasized that this constituted an internationally wrongful act requiring full compensation.<sup>161</sup> Ultimately, the United States accepted responsibility, formally apologized, and paid the Chinese government \$28 million for its losses and \$4.5 million to distribute to the families of those harmed in the bombing.<sup>162</sup>

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(arguing that the Commission “damages its own credibility with a flawed legal analysis of a recent U.S. airstrike”), with Adil Ahmad Haque, *A Careless Attack on the UN’s Commission of Inquiry on Syria*, JUST SEC. (Sept. 21, 2017), <https://www.justsecurity.org/45213/syria-commission-inquiry> [<https://perma.cc/H2YZ-ER82>] (contesting this analysis and arguing that the Commission’s assessment was accurate).

<sup>158</sup> Draft Articles, *supra* note 21, art. 23 cmt. 3 n.347 (quoting M.M. WHITEMAN, 1 DAMAGES IN INTERNATIONAL LAW 221 (1937)).

<sup>159</sup> *Id.*

<sup>160</sup> This is the American version; the Chinese have not accepted that the bombing was accidental. See Press Release, Ministry of Foreign Affs. of the People’s Republic of China, Strong Protest by the Chinese Government Against the Bombing by the US-led NATO of the Chinese Embassy in the Federal Yugoslavia (Nov. 17, 2000), [https://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/200011/t20001117\\_697872.html](https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/200011/t20001117_697872.html) [<https://perma.cc/7Y4V-7XB2>] (describing the attack as “the so-called mistaken bombing”). Various independent investigations have found support for both narratives. E.g., Steven Lee Myers, *Chinese Embassy Bombing: A Wide Net of Blame*, N.Y. TIMES, Apr. 17, 2000, at A1.

<sup>161</sup> Press Release, Ministry of Foreign Affs. of the People’s Republic of China, China and the United States Reached Agreement on Compensation for the Bombing of Chinese Embassy in Yugoslavia by U.S. (Dec. 16, 1999), [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/200011/t20001117\\_679001.html](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/200011/t20001117_679001.html) [<https://perma.cc/U5XN-EPQ6>].

<sup>162</sup> U.N. INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 84, <https://www.icty.org/sid/10052#IVB4> [<https://perma.cc/Z8GZ-77FQ>]. Per the reviewing committee’s recommendation, the ICTY Prosecutor did not open a criminal investigation against the airmen involved in the bombing, *id.* ¶ 85, underscoring the limitations of individual criminal liability as an accountability mechanism. Nor did the law of state responsibility

Again, however, there is a low bar for state compliance with the feasible precautions requirement.<sup>163</sup> A feasible step “is one that is practicable, given resource constraints, technological limits, and tactical concerns, such as the importance of preserving certain means or instrumentalities of warfare (including weapons) for future engagements, and the disadvantage of disclosing certain advancements to adversaries or the world at large.”<sup>164</sup> While international humanitarian law excuses only mistakes of fact that are both objectively and subjectively reasonable, there will be many objectively reasonable mistakes in the fog of war.<sup>165</sup> As noted in the U.S. Law of War Manual, “mere poor military judgment (such as mistakes or accidents in conducting attacks that result in civilian casualties) is not by itself a violation of the obligation to take precautions.”<sup>166</sup>

In short, the law of state responsibility will rarely hold states accountable for harmful acts which result in civilian harm, as such acts will only rarely be considered internationally wrongful. And even if a state is found to have committed an internationally wrongful act, which implicates an obligation to make reparations,<sup>167</sup> harmed civilians have no right to individualized compensation.

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require that the United States provide individualized compensatory payments to victims. *See supra* note 130 and accompanying text.

<sup>163</sup> A few scholars have proposed broader interpretations of the feasible precautions requirement that would raise the compliance bar for states by applying it to weapons development, troop training, intelligence collection, or even the entire target-selection-and-engagement decisionmaking process. *See* Rebecca Crootof, Feasible Precautions by Design (July 1, 2022) (unpublished manuscript) (on file with author) (applying the requirement to weapons design); Corn, *supra* note 18, at 441, 445 (applying it to troop training); Lubin, *supra* note 28 (applying it to intelligence collection); Corn, *supra* note 18, at 435–40, 456–57 (applying it to the entire target-selection-and-engagement decisionmaking process); Margulies, *supra* note 151, at 429–40 (applying it to the entire target-selection-and-engagement decisionmaking process). Under these more expansive readings, a state’s failure to take feasible precautions to minimize the likelihood of unintended civilian harms in armed conflict might constitute an internationally wrongful act, implicating the law of state responsibility. But even if a more expansive understanding of the feasible precautions requirement was widely adopted, there still would be no state responsibility in scenarios where all feasible precautions are taken but a lawful operation nonetheless caused civilian harm, nor would there be a right to individualized compensation for violations.

<sup>164</sup> Margulies, *supra* note 151, at 425.

<sup>165</sup> Milanovic, *supra* note 54 (concluding that international humanitarian law “appears to excuse [only] uses of lethal force against civilians or civilian objects which result from honest *and* reasonable mistakes of fact,” as “[h]onest but *unreasonable* mistakes . . . would inevitably be in violation of [international humanitarian law] rules on precaution”).

<sup>166</sup> Off. of Gen. Couns., U.S. Dep’t of Def., L. of War Manual § 5.2.3.3 (rev. ed. 2016).

<sup>167</sup> Draft Articles, *supra* note 21, art. 31(1). Notably, in armed conflicts, states cannot evade the obligation to compensate a harmed state by invoking justification or excuse, such as *force majeure* or necessity. *Id.* art. 27 (“The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: . . . (b) the question of

## 2. State Civil Liability in Domestic Courts

Domestic courts also fail to provide a useful route to redress for most civilian victims; those who attempt to bring suit against a foreign or forum state almost invariably have their claims quashed.<sup>168</sup>

First, individuals do not have any inherent, widely recognized right to bring suit against foreign states for violations of international humanitarian law,<sup>169</sup> let alone for claims of compensation for lawful but unintended harms that arise in the course of armed conflict.<sup>170</sup> With few exceptions,<sup>171</sup> most suits brought by individuals in domestic

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compensation for any material loss caused by the act in question.”); *see also* Ronen, *supra* note 28, at 189–90 (detailing the history of this provision).

<sup>168</sup> Abraham, *Belligerent Wrongs*, *supra* note 30, at 808. Abraham explores whether a state might be held liable in tort for the actions of its military forces, either indirectly under some form of vicarious liability or directly for negligent training and supervision. Haim Abraham, *Tort Liability in War* 154–61 (Feb. 9, 2021) (unpublished manuscript) (on file with author).

<sup>169</sup> Andrea Gattini, *To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals’ Claims for War Damages?*, 1 J. INT’L CRIM. JUST. 348, 350–51 (2003). While there is a general right to reparation for violations of international humanitarian law, Hague IV, *supra* note 132, art. 3 (“A belligerent party which violates the provisions . . . shall, if the case demands, be liable to pay compensation.”); *see also* First Additional Protocol, *supra* note 14, art. 91, this right is often interpreted as applying only to states, *see* Wexler & Robbennolt, *supra* note 31, at 132–33 & nn.56–59, 68 (citing caselaw and scholarship). A few states create circumscribed rights allowing individuals to sue states for violations of international humanitarian law. *E.g.*, U.S. Alien Tort Claims Act, 28 U.S.C. § 1330 (2012); U.S. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992). To the extent these suits depend on establishing a violation of international humanitarian law, they are subject to the same limitations discussed in the individual defendant context. *See supra* Section I.B.2. One possible exception is the Turkish statute that creates a right to compensation for counterterrorist activities, without regard to whether they occur in the context of an armed conflict. The Law on the Compensation of Damages that Occurred Due to Terror and the Fight Against Terror, Law No. 5233 of 2004, arts. 1, 7 (Turk.) (authorizing claims for compensation for death, injury, property damage, and other losses resulting from Turkish counterterrorist operations).

<sup>170</sup> Many states are party to Status of Forces Agreements (SOFAs), which establish tort claim procedures for harms caused by a foreign state’s military forces—however, these rights are limited to harms incurred during noncombat activities. *See, e.g.*, Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces, June 19, 1995, T.I.A.S. No. 12,666. Similarly, the U.S. Foreign Claims Act allows for the creation of commissions to evaluate claims against the United States for noncombat harms caused by its armed forces. Foreign Claims Act, 10 U.S.C. § 2734 (2012). However, due to its discretionary administration, the Act’s claims process and awards are more akin to *ex gratia* payments than tort suits. *See* Wexler & Robbennolt, *supra* note 31, at 141; John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1465–66 (2008).

<sup>171</sup> *See* Gillard, *supra* note 115, at 538–39 (discussing a 1952 German case and a 2000 Greek case where individual claims were considered, as well as the practical and procedural hurdles that ultimately prevented the claimants from collecting compensation); *see also* Rb. Den Haag, 16 juli 2014, 295247/HA ZA 07-2973 (Mothers of Srebrenica/Netherlands) (Neth.), ¶¶ 4.338, 4.339, 5.1, <https://uitspraken.rechtspraak.nl/>

courts against foreign states for harms incurred in armed conflicts fail.<sup>172</sup> They may be barred by a peace settlement,<sup>173</sup> dismissed for lack of standing<sup>174</sup> or for being contrary to the foreign policy interests of the host state,<sup>175</sup> or thwarted by the defense of foreign state immunity.<sup>176</sup>

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inziendocument?id=ECLI:NL:RBDHA:2014:8748 [<https://perma.cc/R9JJ-SREE>] (finding the Netherlands liable for the deaths of 300 of the 7,000 Bosniaks killed in July 1995 in Srebrenica).

<sup>172</sup> Gillard, *supra* note 115, at 537.

<sup>173</sup> States have the ability to waive both their own and their nationals' right to file reparation claims in peace treaties. Cf. Gattini, *supra* note 169, at 349–50 (explaining that states currently can “wholly sacrifice the interest of the individual” in peace settlements and arguing that states’ right to sign away their nationals’ claims should be limited).

<sup>174</sup> U.S. courts generally find that the right to reparations for international humanitarian law violations is not self-executing and thus does not create a private right of action. Wexler & Robbenolt, *supra* note 31, at 132 (first citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984); and then citing *Handel v. Artukovic*, 601 F. Supp. 1421, 1425–26 (C.D. Cal. 1985)). While the Foreign Claims Act does create a private right of action, it does so only for noncombatant activities of U.S. military personnel; with the exception of errant delivery of malfunctioning bombs, claims that “arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat” are barred. 10 U.S.C. § 2734(b)(3) (2012).

<sup>175</sup> E.g., Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1 (2003) (discussing how the Clinton Administration acted to quash private claims brought against France, Germany, and Austria in U.S. courts, on the grounds that they were at odds with U.S. foreign policy interests).

<sup>176</sup> This is most prevalent in the United States and Japan. Gillard, *supra* note 115, at 537. There is a growing recognition of a “territorial tort exception” to foreign state immunity, which enables plaintiffs to sue foreign governments for noncommercial torts that occur within the forum state’s territory. See *Draft Articles on Jurisdictional Immunities of States and Their Property*, art. 12, U.N. Doc. A/46/10 (1991) (“Unless otherwise agreed . . . , a State cannot invoke immunity from jurisdiction before a court of another State . . . in a proceeding which relates to pecuniary compensation for death or injury . . . , or damage to or loss of tangible property, caused by an act or omission . . . alleged to be attributable to the State . . . .”), reprinted in [1991] 2 Y.B. Int'l L. Comm'n pt. 2, at 13, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2); see also Daniel N. Hammond, Comment, *Autonomous Weapons and the Problem of State Accountability*, 15 CHI. J. INT'L L. 652, 682–83 nn.184–85 (2015) (citing versions enacted by the United Kingdom, Canada, Singapore, South Africa, and in the U.N. Convention on Immunities and European Convention on State Immunity). However, this exception often explicitly excludes or is interpreted to exclude the acts of armed forces. *Id.* at 683–84; see also Fleck, *supra* note 33, at 192 (“Individual claims against states parties to an armed conflict have been constantly rejected by a number of national courts in the United States, Japan and Germany.”); Gattini, *supra* note 169, at 352 (suggesting that, in articulating the territorial tort exception, the International Law Commission simply failed to consider the question of whether it would apply to the acts of armed forces). Given this state practice, the International Court of Justice has held that customary international law requires that “a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict,” even if the state actions violate international humanitarian law or international human rights law. *Jurisdictional Immunities of State (Ger. v. It.: Greece intervening)*, Judgment, 2012 I.C.J. 99, ¶¶ 78, 91 (Feb. 3).

Second, domestic law often explicitly immunizes forum states from tort liability for its actions in armed conflict. For example, in 2005, the Israeli Parliament passed a law granting Israel complete immunity from claims arising in the West Bank and Gaza Strip;<sup>177</sup> in 2006, the Israeli Supreme Court nullified the law, but preserved the exception for any harms arising from “acts of war” and retained the bar on claims brought by citizens of “enemy states” or “activists or members of a terrorist organization.”<sup>178</sup> Similarly, Canadian, British, and U.S. law creates expansive state immunity from tort claims grounded in combat activities.<sup>179</sup>

### 3. Ex Gratia and Other Voluntary Regimes

For expedient reasons or out of a sense of moral obligation, states sometimes voluntarily present *ex gratia* payments to individual civilians harmed in the context of armed conflicts.<sup>180</sup> For example, after the Kunduz strike, President Barack Obama issued an apology,<sup>181</sup> and the United States made over 170 condolence payments to the families of those killed and injured and dedicated \$5.7 million to reconstruct the destroyed facility.<sup>182</sup>

*Ex gratia* payments are often credited with multiple advantages, ranging from recognizing civilian dignity to improving civil-military

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<sup>177</sup> Civil Wrongs (Liability of the State) Law (Amendment No. 7), 5765–2005, SH 953 (Isr.).

<sup>178</sup> See Steven Erlanger, *Israeli Court Clears Way for Palestinians to Seek Redress – Africa & Middle East – International Herald Tribune*, N.Y. TIMES (Dec. 12, 2006), <https://www.nytimes.com/2006/12/12/world/africa/12iht-mideast.3877307.html> [https://perma.cc/P2JA-JWWN] (discussing HCJ 8276/05 Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Defense, 62(1) PD 1 (2006) (Isr.)).

<sup>179</sup> Crown Liability and Proceedings Act, R.S.C. 1985, c C-50, § 8 (Can.) (granting immunity for acts done “for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces”); Crown Proceeding Act 1947, c. 44, § 10 (UK) (granting immunity for any act or omission “done by a member of the armed forces of the Crown while on duty”); Federal Tort Claims Act, 28 U.S.C. § 2680(j) (1948) (retaining sovereign immunity for “[a]ny claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war”); see also Feres v. United States, 340 U.S. 135, 146 (1950) (holding that the United States is not liable under the Federal Tort Claims Act for injuries to members of its armed forces sustained while on active duty due to negligence of others in the armed forces).

<sup>180</sup> I use the term “*ex gratia*” payments to include solatia, condolence, and battle damage payments, all of which are voluntary, discretionary monies given on behalf of a state as expressions of sympathy or in awareness of a humanitarian need. See Wexler & Robbennolt, *supra* note 31, at 143.

<sup>181</sup> *Pentagon Says U.S. to Make Payments to Families of Kunduz Air Strike Victims*, REUTERS (Oct. 10, 2015), <https://www.reuters.com/article/uk-afghanistan-attack-msf-payments-idUKKCN0S40YK20151010> [https://perma.cc/9HFZ-H4S2].

<sup>182</sup> Ali, *supra* note 79.

relations to fostering troop morale.<sup>183</sup> These justifications likely explain why Australia, Canada, Denmark, Poland, the United Kingdom, and the United States have all made *ex gratia* payments.<sup>184</sup>

However, these payments are hardly an accountability mechanism: In addition to being voluntary, they are sporadic, discretionary, and often explicitly not intended to be legally required or compensatory.<sup>185</sup> Rather, they are frequently described as symbolic gestures of sympathy or framed as a counterterrorism strategy that should be employed only with “friendly” civilians.<sup>186</sup> Due to the wide latitude U.S. decisionmakers exercise in dispensing *ex gratia* payments, there have been striking disparities in the amounts paid to civilians in different countries who have suffered similar harms,<sup>187</sup> as well as disparities in whether similarly situated civilians in the same state receive payments.<sup>188</sup> In Khan’s study of more than 1,300 U.S. DoD reports on civilian casualties, she found that “[f]ewer than a dozen condolence payments were made” at all.<sup>189</sup> And, to the extent the purpose of the payments is strategic, “the target audience of the payments is the

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<sup>183</sup> Wexler & Robbennolt, *supra* note 31, at 125 (noting that these repeated assertions have “yet to be systematically evaluated”).

<sup>184</sup> See Daphne Eviatar, *Why Isn’t the US Compensating Families Torn Apart by Its Airstrikes?*, DEF. ONE (July 24, 2020), <https://www.defenseone.com/ideas/2020/07/why-isnt-us-compensating-families-torn-apart-its-air-strikes/167134> [https://perma.cc/YF2F-N3SX] (discussing U.S. payments); Ronen, *supra* note 28, at 215 (citing Australian legislation); *Monetary Payments for Civilian Harm in International and National Practice*, AMSTERDAM INT’L L. CLINIC 12 (2013), <https://ailc.uva.nl/binaries/content/assets/subsites/amsterdam-international-law-clinic/reports/monetary-payments.pdf> [https://perma.cc/EHA2-PJS9] (detailing Australian, British, Canadian, Dutch, and Polish payments to Afghans); *id.* at 14–15 (detailing U.S. payments to Afghans and Iraqis).

<sup>185</sup> *Id.* at 143.

<sup>186</sup> Memorandum from James H. Anderson, Acting Under Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, and Commanders of the Combatant Commands, Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss that Is Incident to Military Operations (June 22, 2020) [hereinafter DoD Memo on Condolence Payments] (on file with author).

<sup>187</sup> Of the 611 payments the United States made in 2019, 605 were paid out in Afghanistan (with the remaining six going to Iraqis). Eviatar, *supra* note 184. Meanwhile, civilians harmed by U.S. actions in other countries, such as those harmed in Somali airstrikes, received nothing. *Id.*

<sup>188</sup> Of the 605 payments the United States made in 2019 to Afghans, 71 were in compensation for deaths or injuries that could be traced to U.S. actions, despite there being more than 750 documented civilian casualties traceable to 2019 U.S.-linked Afghan airstrikes. U.N. ASSISTANCE MISSION IN AFG. & U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., AFGHANISTAN ANNUAL REPORT ON PROTECTION OF CIVILIANS IN ARMED CONFLICT: 2019, at 11, 61 (2020), [https://unama.unmissions.org/sites/default/files/afghanistan\\_protection\\_of\\_civilians\\_annual\\_report\\_2019\\_-\\_22\\_february.pdf](https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2019_-_22_february.pdf) [https://perma.cc/9WD6-5XVC].

<sup>189</sup> Khan, *supra* note 9.

Afghani or Iraqi [or other] public rather than the direct victim.”<sup>190</sup> For these and other reasons,<sup>191</sup> civilian rights advocates often emphasize that, while it may be an important component of making amends, “an ex gratia payment does not address or supplant formal accountability for any unlawful harm.”<sup>192</sup> Indeed, many are concerned that these payments allow states to continue to pursue unpopular or unethical military objectives, insofar as they create a façade of accountability and thereby mute criticism.<sup>193</sup>

Additionally, and separately from *ex gratia* regimes, states sometimes create independent bespoke structures that provide a route to redress for specific types of civilian harms. Germany and Austria established funds and claims review systems to compensate former Nazi slave laborers and others harmed by the Nazi regime.<sup>194</sup> Both the United States and Canada have programs to compensate individuals of Japanese ancestry who were interned, deported, or deprived of property during the Second World War.<sup>195</sup> Various international claims commissions—including the Eritrea–Ethiopia Claims Commission,<sup>196</sup> the U.N. Compensation Commission,<sup>197</sup> and the Iran–United States Claims Tribunal<sup>198</sup>—have been established to settle claims relating to specific conflicts. However, such institutions are few and far between, and each one is jurisdictionally limited to particular claimants and conflicts.

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<sup>190</sup> Bachar, *supra* note 31, at 413.

<sup>191</sup> Cf. *id.* at 412–13 (noting that the U.S. process includes no means of facilitating of reconciliation nor mechanisms for review and monitoring).

<sup>192</sup> Annie Shiel, *DOD’s New Ex Gratia Policy: What’s Right, What’s Wrong, and What’s Next*, JUST SEC. (July 10, 2020), <https://www.justsecurity.org/71332/dods-new-ex-gratia-policy-whats-right-whats-wrong-and-whats-next> [https://perma.cc/QL6A-AKTT].

<sup>193</sup> See Thomas Gregory, *The Costs of War: Condolence Payments and the Politics of Killing Civilians*, 46 REV. INT’L STUD. 156, 159 (2020) (arguing that militaries view condolence payments as a “weapon in the battle for hearts and minds rather than a way of making amends for the harm that was inflicted”).

<sup>194</sup> See Fleck, *supra* note 33, at 193–94 (describing the German and Austrian funds).

<sup>195</sup> *Id.* at 194.

<sup>196</sup> Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Peace Agreement), Eth.-Eri., art. 5, Dec. 12, 2000, 40 I.L.M. 260 (establishing the Commission to evaluate claims for losses between Ethiopia and Eritrea—on behalf of themselves, their nationals, or other relevant parties—resulting from violations of international humanitarian law that occurred during the 1998–2000 conflict).

<sup>197</sup> Who We Are, U.N. COMP. COMM’N, <https://uncc.ch/who-we-are> [https://perma.cc/G7DM-QDK5] (describing the Compensation Commission as a quasi-judicial body with jurisdiction to evaluate claims for losses resulting from Iraq’s invasion and occupation of Kuwait).

<sup>198</sup> Introduction, IRAN-U.S. CLAIMS TRIBUNAL, <https://iusct.com/introduction> [https://perma.cc/KHL4-AKG6] (describing the Tribunal as having jurisdiction over certain property claims of U.S. nationals against Iran, Iranian nationals against the United States, and the two states against each other).

Reparations practices and alternative structures might serve as models for constructing a war torts regime, but these existing accountability mechanisms provide no redress for the vast majority of harmed civilians.

## II WAR TORTS

To address the accountability gap at the heart of international humanitarian law, this Article proposes developing an international “war torts” regime. Enabling civilians to bring claims for their wartime harms—including intended, incidental, and inadvertent harm—would increase the likelihood that victims would receive compensation. It would also encourage states to take steps to mitigate or reduce civilian harms. Ultimately, a war torts regime would further the law of armed conflict’s foundational purpose of minimizing needless civilian suffering.

Again, creating a war torts regime would not alter a state’s or an individual combatant’s range of lawful actions in armed conflict; all existing international humanitarian law—the requirements, limitations, and permissions—would continue to apply. Nor would war torts displace criminal liability and state responsibility for legal violations. Rather, as in domestic legal regimes, the various accountability mechanisms would coexist, balancing and complementing each other.

### *A. Doctrinal Foundations*

While civilian advocates and international law scholars have argued that states have a moral obligation to take responsibility for civilian victims in armed conflict, to the best of my knowledge, as of yet no one has made a doctrinal legal argument for civilians’ right to bring claims against states for their wartime harms.<sup>199</sup> This silence is undoubtedly due to the indisputable fact that the current law cuts the other way: As detailed extensively in Part I, if there is any legal rule at present, it is that states do not have any obligation to compensate civilian victims in armed conflict.

But the law can change. A war torts regime is hardly antithetical to the modern international legal order; instead, it would both better ensure the humanitarian aims of international humanitarian law and be compatible with other long-established legal principles. States are obliged to minimize needless civilian suffering associated with armed

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<sup>199</sup> See, e.g., CRAWFORD, *supra* note 27; Gillard, *supra* note 115, at 551; IN SEARCH OF ANSWERS, *supra* note 26; Fleck, *supra* note 33, at 180; Reisman, *Compensating*, *supra* note 16; Reisman, *Qana*, *supra* note 33, at 398–99; Paul, *supra* note 26, at 89.

conflict; doing so by providing compensation to civilians would not implicate military necessity and would accord with the general legal principle that one should provide compensation for caused harm.

### *1. The Obligation to Minimize Needless Civilian Suffering*

Minimizing needless civilian suffering is one manifestation of the law of armed conflict's foundational "humanity" principle.<sup>200</sup> In addition to the overarching conceptual commitment to this aim that undergirds all international humanitarian law, situation-specific corollaries for minimizing needless civilian harm are detailed in customary international law<sup>201</sup> and treaty law rules.<sup>202</sup>

#### a. Minimizing Needless Civilian Suffering

Creating a war torts regime would further realize the humanity principle. As recognized in domestic tort law and transitional, restorative, and transformative justice literatures, providing some form of compensation for harms caused serves multiple ameliorative purposes. It acknowledges the dignity of the recipient, the reality and extent of the harm, and the role of the entity who caused that harm.

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<sup>200</sup> This principle traces its origins to some of the earliest international law publicists. E.g., EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE [THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW] (1758), translated in 4 THE CLASSICS OF INTERNATIONAL LAW bk. 3, at 282–83 (James Brown Scott ed., Charles G. Fenwick trans., 1916). It is echoed in contemporary descriptions of international humanitarian law, such as the International Committee of the Red Cross's statement that the law of armed conflict is "a set of rules which seek, for humanitarian reasons, *to limit the effects of armed conflict.*" INT'L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), [https://www.icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf) [<https://perma.cc/ZWG4-MFJL>] (describing the purpose of international humanitarian law). Other manifestations of the "humanity" principle include minimizing harms to combatants and prisoners of war. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>201</sup> E.g., Rules 1–24, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul) [<https://perma.cc/4E4Y-6DDX>] (identifying varied customary rules intended to minimize needless civilian suffering in armed conflict).

<sup>202</sup> E.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (creating protections for civilians in times of war); First Additional Protocol, *supra* note 14, pmbl. (drafted in part to "reaffirm and develop the [extant] provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application"). Some treaty requirements predate the Geneva Conventions. E.g., Convention with Respect to the Laws and Customs of War on Land (Hague, II) arts. 25, 27–28, 42–56, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Hague IV, *supra* note 132, arts. 25, 27–28, 42–56.

And while compensatory monies for death, bodily injury, emotional harm, and property damage never make a victim whole,<sup>203</sup> they do address myriad needs of victims and their families, including emotional needs for acknowledgement, respect, and closure<sup>204</sup> as well as practical needs for funds for funerals, prostheses, medication, and property repair and replacement.

Certainly, a more comprehensive amends program would also further the humanity principle. Throughout history and across cultures, civilian victims in armed conflict have expressed a desire for acknowledgements of wrongdoing, guarantees of non-repetition, and compensation.<sup>205</sup> A war torts regime might possibly serve all three aims—findings of liability might include acknowledgements of wrongdoing, and improved information on civilian harms could indirectly foster harm mitigation.<sup>206</sup> But while it might be a component of a more comprehensive transitional justice program, a war torts regime has a more limited aim—to increase the likelihood that harmed civilians are compensated.<sup>207</sup> In achieving that, it could contribute to the amends movement by helping shift norms regarding what the humanity principle requires.

Pursuant to the Geneva Conventions, states must do “everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.”<sup>208</sup> Establishing an accounta-

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<sup>203</sup> See Richard L. Abel, *Torts, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 445 (David Kairys ed., 3d ed. 1998) (observing that tort law fosters the fiction that all harms are compensable with monetary damages).

<sup>204</sup> Wexler & Robbennolt, *supra* note 31, at 158 (“[O]ffers of repair or compensation can imply other components of amends, such as expressing remorse or taking responsibility, though it is unclear how well this finding generalizes to the sorts of relatively modest payments that are offered for purposes of condolence (rather than compensation) . . . .”); see also *id.* at 150–57 (detailing the import of acknowledgement, respect, explanation, and guarantees of non-repetition in amends mechanisms).

<sup>205</sup> See Rebecca J. Hamilton, *Platform-Enabled Crimes: Pluralizing Accountability When Social Media Companies Enable Perpetrators to Commit Atrocities*, 63 B.C. L. REV. 1349, 1384 (2022) (acknowledging that these desires are not held by every survivor and do not constitute the priorities of any given population); Wexler & Robbennolt, *supra* note 31, at 155–57 (discussing civilians’ desire for information); *id.* at 157–58 (discussing civilians’ desire for guarantees of non-repetition).

<sup>206</sup> See *infra* Section II.C.2.

<sup>207</sup> Monetary recompense is far from sufficient redress for the varied harms civilians suffer in armed conflict. A comprehensive amends process would include a host of reparative measures, including “other material assistance, service, expressions of remorse or sympathy, apologies, accounts or other information about what happened, and promises of forbearance,” Wexler & Robbennolt, *supra* note 31, at 149, ideally customized according to the cultural context and tailored to the individual situation, *see id.* at 175–79 (describing how culture impacts the perception, provision, and acceptance of condolence payments).

<sup>208</sup> INT’L COMM. OF THE RED CROSS, 2 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: THE GENEVA CONVENTION FOR THE AMELIORATION OF THE

bility mechanism to provide compensation to all civilians harmed in armed conflicts is not legally required, but it accords with and would advance international humanitarian law's aims.<sup>209</sup>

### b. Humanity and Military Necessity

To observe that “humanity” is one of international humanitarian law’s foundational principles is not to say it is the only one. International humanitarian law’s other main purpose is to regulate the conduct of hostilities between armed forces. These two goals—minimizing needless civilian harm and enabling necessary military activities—are sometimes described as being in tension and thus in need of being “balanced” against each other.<sup>210</sup>

Some might be concerned that creating a war torts regime would tip the balance too far in favor of humanity at the expense of military necessity.<sup>211</sup> To the extent this argument has credence, it depends on establishing that the threat of war torts costs would inappropriately hamper states in achieving their legitimate military aims. Of course, given the lack of information about the actual extent of civilian harms (and therefore the extent of states’ potential exposure), this claim is difficult to establish or disprove empirically.

We do know that the creation of an international war torts regime depends on state consent, and states are unlikely to establish a compensatory regime that will significantly constrain their military freedom by introducing incapacitating costs.<sup>212</sup> But states’ unlikelihood to create a regime that will bankrupt them doesn’t render the entire

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CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA  
26 (Jean Pictet ed., 1960).

<sup>209</sup> Cf. Sarah Holewinski, *Making Amends: A New Expectation for Civilian Losses in Armed Conflict*, in CIVILIANS AND MODERN WAR: ARMED CONFLICT AND THE IDEOLOGY OF VIOLENCE 317, 320 (Daniel Rothbart, Karina V. Korostelina & Mohammed D. Cherkaoui eds., 2012) (describing amends as “a logical extension of civilian protection mores”); Wexler & Robbenolt, *supra* note 31, at 126, 181–82 (making a similar argument for improving amends mechanisms).

<sup>210</sup> Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 796 (2010); see also MICHAEL WALZER, JUST AND UNJUST WARS 135 (4th ed. 2006) (describing the “war convention” as the meeting point between these aims); Cox, *supra* note 119 (describing these two aims as fostering a “humanitarian” and “combatant” perspective, respectively). *But see* Adil Ahmad Haque, *Indeterminacy in the Law of Armed Conflict*, 95 INT'L L. STUD. 118, 150–51 (2019) (critiquing the “balancing” metaphor, especially when used to imply that one element is being illegitimately privileged at the expense of the other).

<sup>211</sup> Michael Schmitt—one of the staunchest defenders of this balancing conception—acknowledges that there has been a general shift towards granting “humanity” more weight, but he expresses dismay at this trend. Schmitt, *supra* note 210, at 805–06.

<sup>212</sup> And, as shown in domestic regimes, it is possible to create compensatory mechanisms for actions in armed conflict that have little impact on military decisionmaking. See *infra* Section II.D.2.

endeavor a foregone failure. Even relatively small compensatory payments might be invaluable to recipients, as well as having an expressive value for the individual and greater community.<sup>213</sup> Simultaneously, the existence of a war torts regime could foster multiple indirect benefits.<sup>214</sup> It seems probable that an actualized war torts regime could help mitigate needless civilian suffering without over-deterring military action.<sup>215</sup>

Further, humanity and military necessity need not be in conflict; they may also be mutually reinforcing.<sup>216</sup> As the U.S. DoD recognized, “Protecting civilians is fundamental to our forces’ professional military ethos and our National Defense Strategy.”<sup>217</sup> Accordingly, the U.S. military is creating new internal policies on minimizing and responding to civilian harm in military operations.<sup>218</sup> Participating in a war torts regime would facilitate many of the Strategy’s goals—including improving processes for civilian and NGO reporting, data gathering, transparent acknowledgement of caused harm, provision of *ex gratia* payments, understanding causes of civilian harm, distilling broader lessons, and implementing better practices going forward.<sup>219</sup> Meanwhile, the absence of accountability may undermine strategic aims.<sup>220</sup>

Relatedly, there is an oft-voiced concern that legal arguments promoting civilian protection are an underhanded and inappropriate infusion of international human rights law (the law of state obligations towards individuals, which some understand to only apply in peace-time) into international humanitarian law (the law of state obligations

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<sup>213</sup> Cf. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 1 (2017) (discussing the importance of tort’s expressive function in vindicating victims). However, insultingly low payments might have a negative effect, signaling the smallness of a given harm to the responsible entity. See Bachar, *supra* note 31, at 411.

<sup>214</sup> See *infra* Section II.C.

<sup>215</sup> See *infra* Section II.D.2.

<sup>216</sup> See Haque, *supra* note 210, at 151 (arguing that we must reject the view that “the legal protections of civilians [are pitted] against the legal prerogatives of combatants”); Paul, *supra* note 26, at 99 (arguing that the nonexistence of a right to individualized compensation for civilian harms in armed conflict “cannot be justified on grounds of military necessity”).

<sup>217</sup> DoD Memo on Civilian Harm, *supra* note 25, at 1; see also Memorandum from Headquarters, Int’l Sec. Assistance Force, Tactical Directive (July 6, 2009) (on file with author).

<sup>218</sup> See DoD Memo on Civilian Harm, *supra* note 25, at 2 (outlining a directive to standardize processes for investigating civilian casualties and offering condolences, among others); Schmitt, Savage & Khan, *supra* note 12.

<sup>219</sup> DoD Memo on Civilian Harm, *supra* note 25, at 2. Many of the military and strategic benefits associated with *ex gratia* payments would also apply to war torts compensation. See *supra* note 183 and accompanying text.

<sup>220</sup> See *supra* notes 25–27 and accompanying text.

during armed conflict).<sup>221</sup> But even assuming for the sake of argument that international humanitarian law completely displaces international human rights law in armed conflict—a debatable assumption!<sup>222</sup>—international humanitarian law contains its own justifications for establishing a compensatory regime for civilian harms.<sup>223</sup> International humanitarian law and international human rights law evolved separately and sometimes conflict, but they share many aims, including minimizing state-sponsored civilian harm.<sup>224</sup> So while a war torts regime might satisfy certain states' human rights law obligations,<sup>225</sup> and while some might view this project as an attempt to shoe-horn human rights law—such as the right to an individual remedy for rights violations—into international humanitarian law, the need to address the accountability gap can be grounded solely in the law of armed conflict.<sup>226</sup>

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<sup>221</sup> See, e.g., Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 43 (2010) (arguing that protective interpretation is a “circuitous attempt to squeeze a plainly human rights norm into a restraint on attacks against direct participants under the guise of [international humanitarian law]”); Geoffrey S. Corn, Laurie R. Blank, Chris Jenks & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536, 601 (2013) (suggesting that arguments for a “least harmful means” rule are “an explicit (or perhaps subtle) effort to extend human rights law's proportionality protections applicable to peacetime law enforcement activities into the treatment of belligerents during armed conflict”).

<sup>222</sup> See, e.g., HAQUE, *supra* note 136; Hathaway et al., *supra* note 136 (discussing different approaches to reconciling human rights law and humanitarian law).

<sup>223</sup> See *supra* Section II.A.1.

<sup>224</sup> As noted by the former Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, both international humanitarian law and international human rights law are “victim oriented and predicated on social and human solidarity,” justifying creating a single instrument codifying victims’ rights to a remedy and reparation under both regimes. THEO VAN BOVEN, U.N. AUDIOVISUAL LIBR. OF INT'L L., THE UNITED NATIONS BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (2010), [https://legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_e.pdf](https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf) [<https://perma.cc/HM2Q-BRQG>].

<sup>225</sup> Namely, to not violate individuals’ human rights, to adopt all reasonable measures to protect human rights, and to ensure the effective enjoyment of human rights. Of course, this will only be relevant to the extent that one also accepts (1) the extraterritorial application of international human rights law (which is more likely with negative than positive duties); and (2) that the law of armed conflict does not wholly displace human rights law, *see supra* note 222 and accompanying text.

<sup>226</sup> In fact, as I articulate it, a war torts regime would address far more harms than human rights law does, insofar as the latter tends to focus on intentional violations rather than harmful acts generally. *See* Bachar, *supra* note 31, at 378.

## 2. The Obligation to Provide Compensation for Caused Harm

The idea that an entity who causes harm should pay compensation is pervasive in international law. This concept is most firmly established when the harmful act is a violation of an obligation, as evidenced by Grotius's observation that from any "Fault or Trespass there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done,"<sup>227</sup> the Permanent Court of International Justice's 1928 proclamation that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation,"<sup>228</sup> and the Draft Articles of State Responsibility requirement that states must make full reparation for internationally wrongful acts.<sup>229</sup>

But the broader idea—that causing harm may justify imposing a duty to compensate, regardless of whether the harmful act is lawful—is also ubiquitous. It appears in international jurisprudence<sup>230</sup> and in varied other legal incarnations<sup>231</sup>: Compensation obligations are recognized when a state takes property for a public purpose,<sup>232</sup> when an occupying power requisitions materials or services from inhabitants of the occupied territory,<sup>233</sup> when states' space objects cause earthside damage,<sup>234</sup> and when states cause transboundary harm.<sup>235</sup> In fact, a

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<sup>227</sup> HUGO GROTIUS, 2 THE RIGHTS OF WAR AND PEACE 884, ¶ I (Richard Tuck ed., Jean Barbeyrac trans., 2005) (1625); see also Beatrice A. Walton, Note, *Duties Owed: Low-Intensity Cyber Attacks and Liability for Transboundary Torts in International Law*, 126 YALE L.J. 1460, 1480 (2017) (discussing how, in Grotius's time, the failure to provide compensation for caused harm could itself be a just cause for war).

<sup>228</sup> Factory at Chorzów (Ger. v. Pol.), Claim for Indemnity, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

<sup>229</sup> Draft Articles, *supra* note 21, art. 31.

<sup>230</sup> See, e.g., Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1965–66 (Mar. 11, 1941); Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22–23 (Apr. 9).

<sup>231</sup> See Rebecca Crootof, *International Cybertorts: Expanding State Accountability in Cyberspace*, 103 CORNELL L. REV. 565, 602 n.162 (2018) [hereinafter Crootof, *International Cybertorts*] (citing treaties creating state liability for "specific kinds of harms," such as nuclear accidents, oil spills, and incidents involving other hazardous materials, and "harms which endanger the use of shared spaces," like watercourses, transboundary waters, and outer space).

<sup>232</sup> Draft Articles, *supra* note 21, general cmt. ¶ 4(c).

<sup>233</sup> Hague IV, *supra* note 132, Annex, art. 52.

<sup>234</sup> Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187.

<sup>235</sup> E.g., Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (Mar. 11, 1941) ("[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein . . . ."); Pemmaraju Sreenivasa Rao (Special Rapporteur), *Third Rep. on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities)*, ¶ 27, U.N. Doc. A/

failure to provide compensation for caused harm can itself constitute an internationally wrongful act, triggering the applicability of state responsibility.<sup>236</sup> The concept that one is responsible for the harms one causes also pervades domestic legal regimes, insofar as most include some form of strict liability torts.<sup>237</sup> Accordingly, international law scholars have recognized that, at least in certain situations, there is a “general principle of law . . . that those who cause injury to others compensate them.”<sup>238</sup>

Nothing precludes creating a corresponding obligation for states to provide compensation for civilian harms in armed conflict.<sup>239</sup> In fact, the concept of providing compensation for lawful wartime harms is not unprecedented. Internationally, peace treaties historically addressed both collective and individual costs,<sup>240</sup> although, with the decline in formal peace treaties, this practice has also declined.<sup>241</sup> Domestically, various practices create compensatory obligations for

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CN.4/510 (June 9, 2000) (“[W]rongful acts are the focus of State responsibility, whereas compensation for damage [is] the focus of international liability.”).

<sup>236</sup> Crootof, *International Cybertorts*, *supra* note 231, at 603.

<sup>237</sup> E.g., Int’l Law Comm’n, Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities), ¶ 112, U.N. Doc. A/CN.4/543 (June 24, 2004) (noting that “strict liability, as a legal concept, now appears to have been accepted by most legal systems,” though “[t]he extent of activities subject to strict liability may differ”).

<sup>238</sup> W. Michael Reisman & Robert D. Sloane, Comment, *The Incident at Cavalese and Strategic Compensation*, 94 AM. J. INT’L L. 505, 514 (2000).

<sup>239</sup> Gabriella Blum and Natalie Lockwood note that arguments in favor of creating a duty for states to compensate civilians harmed by lawful actions “generally fail to establish that . . . the infliction of civilian injuries *through war* presents special reasons in support of a duty to repair or compensate.” Gabriella Blum & Natalie J. Lockwood, *Earthquakes and Wars: The Logic of International Reparations*, in *JUS POST BELLUM AND TRANSITIONAL JUSTICE* (Larry May & Elizabeth Edenberg, eds. 2013). While I don’t disagree with their theoretical moves, legal regimes often identify one class of harmed individuals who may receive compensation for certain activities without extending that right to all harmed individuals.

<sup>240</sup> E.g., Treaty of Peace with Germany (Treaty of Versailles) arts. 231–32, June 28, 1919, 225 Parry’s T.S. 189 [hereinafter Treaty of Versailles]; *see also id.* annex I (detailing types of injuries covered by the treaty, including both civilian and state damages); *see also* Gillard, *supra* note 115, at 535–36 (discussing the WWII Japanese peace treaty, which indemnified the state for harms inflicted on Allied prisoners of war and was intended to be “a full and final settlement precluding claims from individual victims”); Wuerth, *supra* note 175, at 28 & n.181 (discussing an 1801 U.S./French treaty, wherein the United States renounced its nationals’ claims in exchange for French renunciation of claims for treaty violations; an 1819 U.S./Spanish treaty, where both countries relinquished claims for their citizens’ harms; and the Treaty of Guadalupe Hidalgo, in which both parties renounced “all claims by citizens of either country against the government of the other”).

<sup>241</sup> See Tanisha M. Fazal, *The Demise of Peace Treaties in Interstate War*, 67 INT’L ORG. 695, 695 (2013) (finding that, since approximately 1950, “the rate at which interstate wars have ended with a formal peace treaty has declined dramatically”).

harms caused during armed conflicts. Several legal systems grounded in Islamic law, including in Afghanistan and Somalia, require the payment of *diya* for both intentional and unintended killings, which has sometimes been applied to deaths that occur in armed conflict.<sup>242</sup> Similarly, the Acholi people of northern Uganda's rite of *mato oput* requires compensation for wartime accidental killings.<sup>243</sup> And while the International Law Association's Committee on Reparations for Victims of Armed Conflict did not endorse the existence of a right to compensation for all civilians harmed in armed conflicts, it did not deem it impossible—it simply tabled the issue for another day, given the lack of state practice.<sup>244</sup> As noted in commentary to the committee's draft resolution, “incidental losses might be caused by lawful conduct according to the rules of international law applicable in armed conflict, given that not every injury to civilians constitutes a violation of international law. It is as yet unclear whether a right to reparation is triggered in such a situation.”<sup>245</sup> In its final report, the committee left the matter unresolved but noted that any right to compensation associated with unlawful acts should not be interpreted to limit the rights of “other persons who have suffered from the consequences of armed conflict.”<sup>246</sup>

Although the principle of humanity and the obligation to provide compensation for caused harms do not require creating an obligation to compensate harmed civilians, doing so would affirm and fulfill international humanitarian law’s animating aims. But what form should it take?

### B. Fundamental Characteristics

An ideal war torts regime would (1) require states to pay compensation for (2) both lawful and unlawful acts in armed conflict that cause civilian harm and (3) have an institutional structure designed to facilitate victim redress. If structured as an adversarial process (as

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<sup>242</sup> Paul, *supra* note 26, at 107 n.109.

<sup>243</sup> *Id.*; see also Jessica L. Anderson, *Gender, Local Justice, and Ownership: Confronting Masculinities and Femininities in Northern Uganda*, 41 PEACE RSCH. 59, 78 n.6 (2009).

<sup>244</sup> Rainer Hofmann, *Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)*, 74 INT'L L. ASS'N REP. CONF. 291, 303 (2010).

<sup>245</sup> Int'l Law Ass'n, Hague Conference: Reparation for Victims of Armed Conflict, *Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)*, art. 4, cmt. 3 (2010); see also *id.* art. 9, cmt. 2.

<sup>246</sup> Int'l Law Ass'n, ILA Conf. Res. 2/2010, *Reparation for Victims of Armed Conflict*, art. 14(1) (2010); see also *id.* art. 1(1).

opposed to a no-fault system, like a claims commission), states should be held strictly liable for their harmful acts.<sup>247</sup>

### 1. State Accountability

It is possible to make moral arguments for requiring any entity whose actions contributed to causing civilian harm to pay compensation. As a legal matter, however, it is theoretically and practically preferable to hold states accountable. When compared with individual defendants,<sup>248</sup> not only is it fairer to focus solely on the state, the state is also the entity best able to make the “cost-benefit analysis between accident costs and accident avoidance costs” and act on that evaluation.<sup>249</sup> As a practical matter, should a war torts regime be developed in an adversarial setting, it will be far easier for claimants to identify the relevant state defendant than the relevant individual and more likely that states will be able to pay damage awards. In short, requiring states to pay will increase the likelihood that victims are compensated and encourage states to develop domestic structures, policies, and practices to minimize and appropriately distribute the costs of civilian harm.<sup>250</sup>

Between the state and the individuals, it is far fairer to hold the state accountable for war torts. Many unintended civilian harms in armed conflicts are the results of larger processes, which cannot easily be attributed to or corrected by any one actor.<sup>251</sup> To the extent civilian

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<sup>247</sup> Many of my arguments in this Section necessarily draw from U.S. scholarship on tort law, as that is my area of relative expertise. I welcome future works that identify distinctions with other tort law regimes and their implications for developing a war torts regime.

<sup>248</sup> For the purpose of this Section, I use the term “individual” defendant to refer to both individual and private entities that might be considered as possible defendants, including combatants, intelligence agents and sources, private military contractors, weapons designers, manufacturers, and procurers, financiers, or other individual or corporate entities who facilitate armed conflict. For arguments regarding the incentivizing of safer practices by specific entities, see, for example, Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT'L L. 321 (2011); David Hughes, *Differentiating the Corporation: Accountability and International Humanitarian Law*, 42 MICH. J. INT'L L. 47 (2020).

<sup>249</sup> In tort law parlance, the state is both the “cheapest cost avoider” and best “cost spreader.” GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26–28 (1970).

<sup>250</sup> Laura Dickinson has highlighted the often-underappreciated utility of domestic civilian and military administrative accountability regimes for information gathering, sanctions, and reforms; establishing an international war torts liability would likely foster their further development. See Laura A. Dickinson, *Lethal Autonomous Weapons Systems: The Overlooked Importance of Administrative Accountability*, in THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 69 (Eric Talbot Jensen & Ronald T.P. Alcala eds., 2019).

<sup>251</sup> Wexler & Robbennolt, *supra* note 31, at 179 & n.373.

harms can be traced to insufficient processes rather than intentional acts, the state is the entity which best represents the collective responsibility of the varied individuals who make decisions which cause civilian harm.<sup>252</sup>

Furthermore, the state is better situated to anticipate, mitigate, pay, and spread costs. Before an armed conflict occurs, the state commissions and procures military technology, so it can make contracts conditional on meeting defined safety standards or otherwise incentivize the development of more reliable systems. It creates its rules of engagement, trains its military forces, and determines and enforces consequences for compliance failures. It conducts legal reviews of its weapons, creates procedures to monitor and update its data banks, and develops policies to ensure the accuracy of both operation-level and individual-targeting-level information. State agents collectively decide whether, where, and when to engage in armed conflict,<sup>253</sup> and once involved, state agents make decisions about how to engage in particular operations. But no matter what safety precautions are taken, a state's actions will almost invariably result in some civilian harm; when that occurs, the state can both dispense large sums and construct domestic legal regimes that spread their costs appropriately.<sup>254</sup> For example, a state is best able to weigh the policy arguments for and against holding weapon designers, manufacturers, and procurer industries liable for state costs. A state might create domestic mechanisms for transferring expenses to these entities and require

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<sup>252</sup> Cf. Crootof, *Accountability for Autonomous Weapons*, *supra* note 32, at 1396 n.273 (“[H]olding a state strictly liable is akin to joint enterprise liability, insofar as the state can be conceived as a stand-in representing the designers, manufacturers, programmers, and deployers [of harm].”); Wexler & Robbenolt, *supra* note 31, at 179 (“Given the nature of armed conflict, often no one person is singularly causally responsible for a lawful civilian death, but rather multiple persons all acting under the authority of the state might be identified as causally responsible.”).

<sup>253</sup> Cf. Lubell & Cohen, *supra* note 17, at 191 (“[T]he exceptions allowing resort to force are best evaluated by the executive branch and military high command, not the soldiers on the ground.”).

<sup>254</sup> Seth Lazar has expressed concern that state liability might result in a state unfairly shifting the costs of its activities from bad actors to the general populace. Seth Lazar, *Skepticism about Jus Post Bellum*, in *MORALITY, JUS POST BELLUM, AND INTERNATIONAL LAW* 204, 210 (Larry May & Andrew Forcehimes eds., 2012). But that is not “unfair”; that is simply how states operate. See Abraham, *Belligerent Wrongs*, *supra* note 30, at 833 (“As the resources of the state are the resources of its public, it is unavoidable that the costs of compensation for state liability will be passed on to its citizens.”). Unlike in international criminal law, where some have argued that it is unfair to ask taxpayers to shoulder the costs of adjudication and payment for another individual’s wrongful actions, e.g., MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 204 (2007) (suggesting how reparations awards for an atrocity might be tailored to exclude those who attempted to prevent or halt it), here taxpayers are being asked to absorb the costs that flow from state action, which was presumably taken in their name and for their benefit.

that they carry sufficient insurance. Alternatively, a state might indemnify such industries and set aside funds from a public account to cover costs.<sup>255</sup>

In contrast, holding individuals liable would do little to further the aims of a war torts regime. First, to the extent holding individuals liable appears to impose an unfair cost on them, it will delegitimize the regime: Why should a combatant, taking a reasonable and lawful action based on available information, become liable for following orders? Second, to the extent that they are judgment proof,<sup>256</sup> limiting defendants to individuals will often functionally mean that civilians will continue to bear the costs.

While I doubt a war torts regime will directly incentivize safer practices,<sup>257</sup> individual liability would be even less effective than state liability in fostering desirable systemic changes. In situations where combatants are able to exercise choice, they already have a host of moral, legal, and practical reasons to minimize civilian harm.<sup>258</sup> Other individuals—like commanders, intelligence agents, and weapons designers and procurers—also have extant incentives to minimize errors. If these motivators are insufficient, states could increase them through more tailored, modifiable, and enforceable domestic law and policies. Further, incentives are most useful in shifting practices when an actor is able to evaluate their anticipated liability and determine the appropriate precautions; they are generally less effective in addressing inadvertent accidents.<sup>259</sup> Scapegoating an individual for the unintended effects of broader policy decisions and practices is not only unfair, it also allows the state—the entity best able to minimize risks—to sidestep the consequences of its choices.

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<sup>255</sup> Cf. *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with Commentaries*, at 151–66, U.N. Doc. A/61/10 (2006) (reviewing state options for ensuring there are sufficient funds to compensate victims of transboundary damage), reprinted in [2006] 2 Y.B. Int'l L. Comm'n pt. 2, at 59, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2).

<sup>256</sup> *Judgment-Proof*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a judgment-proof individual as one who is “unable to satisfy a judgment for money damages because the person has no property, does not own enough property within the court's jurisdiction to satisfy the judgment, or claims the benefit of statutorily exempt property”).

<sup>257</sup> See *infra* notes 365–71 and accompanying text.

<sup>258</sup> Indeed, knowledge of state liability might constitute an additional reason for individual combatants to take care. Cf. Bruce Chapman, *Corporate Tort Liability and the Problem of Overcompliance*, 69 S. CAL. L. REV. 1679, 1695 (1996) (arguing that holding corporations, rather than employees, liable for caused harm would incentivize optimal deterrence). Thanks to Haim Abraham for this point.

<sup>259</sup> See, e.g., Bruce Feldthusen, *If This Is Torts, Negligence Must Be Dead*, in TORT THEORY 394, 409 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Susan Randall, *Corrective Justice and the Torts Process*, 27 IND. L. REV. 1, 14 (1993).

## 2. Compensation for Lawful Acts—Even in War<sup>260</sup>

The legality of the harmful act should not affect whether civilians can receive compensation for it.<sup>261</sup> Not only would such a distinction be unfair, but it also would not incentivize states to take more care, it would introduce unnecessary factual and legal disputes, and it would risk creating an enormous loophole. Conversely, not distinguishing between lawful and unlawful acts would have the benefits of fairness and simplifying the administration of a war torts regime. Finally, arguments for allowing all harmed individuals to bring claims does not entail treating all harmful acts alike. Instead, rather than influencing whether civilians can be compensated, the legality of the harmful act might impact how much compensation they receive, insofar as unlawful acts raise the possibility of punitive as well as compensatory damages.

Many scholars have noted the inherent unfairness of differentiating among equally innocent victims based on the lawfulness of the cause of their harm. Michael Reisman proclaims that all victims “are entitled to the repair of their injuries.”<sup>262</sup> Emanuela-Chiara Gillard argues that distinguishing between victims of lawful and unlawful action is unjust, as it results in not treating like cases alike.<sup>263</sup> Dieter Fleck states, “[w]hen it comes to reparation, it would be hardly satisfactory to propagate a limitation to victims of violations of international law (direct victims) and exclude victims of permissible collateral damages (indirect victims)” on the grounds that this distinction would not be comprehensible to those injured and would not make political sense.<sup>264</sup> In contrast, as Yaël Ronen observes, distinguishing between

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<sup>260</sup> In this Section, I address the question of whether states should be liable for lawful acts they take under *jus in bello*; a separate but related question is whether states should be liable for acts they take in self-defense under *jus ad bellum*. See Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 52–54) (arguing that “self-defense” should not be a defense to a war torts charge; instead, victim states subject to war torts claims should be able to file for contribution against the aggressor state).

<sup>261</sup> Cf. Jennifer K. Robbennolt & Lesley Wexler, *Service Members’ Reactions to Amends for Lawful Civilian Casualties*, 2021 U. ILL. L. REV. 399, 423 (2021) (finding that most service members do not see the lawfulness of harm to civilians as a barrier to offering amends).

<sup>262</sup> Reisman, *Qana*, *supra* note 33, at 398; see also Reisman, *Compensating*, *supra* note 16, at 15.

<sup>263</sup> Gillard, *supra* note 115, at 551 (“Insistence on the need for a violation would mean that a civilian whose house was targeted would be compensated, but that his neighbour, whose dwelling was destroyed as the result of permissible collateral damage, would not. . . . [But] the victims . . . are equally in need.”).

<sup>264</sup> Fleck, *supra* note 33, at 180.

lawful and unlawful acts in this context may inadvertently “give[] a seal of approval” to injuring civilians.<sup>265</sup>

One might argue that creating liability only for unlawful acts would incentivize states to act more lawfully, but such a change would be of little help to civilians. Most international humanitarian law requirements are designed to minimize needless civilian suffering, not incentivize safer state action. The law of armed conflict permits extensive incidental and accidental civilian harms; absent back-end compensatory mechanisms, civilians will bear the associated costs. Requiring states to pay for lawfully caused harms in armed conflict would create the missing accountability mechanism.

Further, if lawful acts do not incur liability, the exception might eat the rule. For example, the United States has a far more inclusive definition of who qualifies as an individual associated with an armed group and directly participating in hostilities than the International Committee of the Red Cross and other states; it also has refused to adopt a presumption that unknown individuals are civilians (even when they are children).<sup>266</sup> This approach simultaneously increases the number of individuals who can be lawfully targeted and minimizes the amount of anticipated civilian damage in proportionality analyses; as a result, the U.S. approach puts more civilians at risk than narrower ones.<sup>267</sup> Excluding lawful acts from war torts liability would further foster state adoption of expansive interpretations, with possibly deadly effects for civilians.<sup>268</sup>

Some resist lumping all harmed civilians together on more conceptual grounds. Abraham is a staunch defender of the idea that states should only be liable for unlawful acts in armed conflicts.<sup>269</sup> Armed conflict, he notes, is an inherently deadly and destructive activity; to the extent international humanitarian law permits certain harm-

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<sup>265</sup> Ronen, *supra* note 28, at 197.

<sup>266</sup> See Rosen, *supra* note 6 (reporting that the United States diverges from other states and the ICRC in having a more expansive and context-dependent determination of who counts as a member of an armed group and examining the United States’ statement that it could not determine conclusively whether some women and children who were targeted in the 2019 airstrikes in Baghuz, Syria, were combatants or civilians).

<sup>267</sup> *Id.* (noting that the U.S. Central Command said that it could not determine conclusively whether the sixty people killed in its 2019 Baghuz strike were combatants or civilians, given that many were carrying weapons).

<sup>268</sup> For similar reasons, there should not be an affirmative defense of lawful action. Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 50) (arguing that an affirmative defense of lawful action would encourage states to adopt legal standards that are more permissive of civilian harm in order to escape liability).

<sup>269</sup> Abraham, *Belligerent Wrongs*, *supra* note 30, at 812. Although Abraham’s argument focuses on domestic tort regimes, his reasoning is similarly applicable at the international level, should war torts be operationalized as an adversarial system.

causing acts, they are not wrongful<sup>270</sup> and so states should not be held liable for them.<sup>271</sup>

There are two possible responses to Abraham's assessment. One is a structural one: It might be possible to design a war torts regime that includes an adversarial tribunal for claims against states for their unlawful acts and a victims' fund or other no-fault administrative system for claims resulting from lawful ones. This would introduce complexity and new incentives, but it might address Abraham's concern while ensuring all harmed civilians are able to bring a claim for compensation.

But there is no need for this complexity, in that it is not doctrinally inappropriate to establish legal liability for harms caused by lawful actions. Quite the contrary! Domestic tort law regularly holds entities strictly liable for injuries incidental to permitted action: It is not unlawful to own a dog, to build a reservoir, to put on a fireworks show, or sell a product, but if one entity causes harm to another in the course of engaging in these lawful activities, there may be an obligation to provide compensation.<sup>272</sup> Nor is warfare the only legally regulated deadly activity—and the inherent dangerousness of a lawful activity in domestic law is often an argument for strict liability, rather than no liability.<sup>273</sup> Further, there is significant international precedent for the principle that imposing harm on another creates an obligation to redress it, even if the original action was lawful.<sup>274</sup> Accordingly, both international tribunals and claims commissions have declined to distinguish between victims of lawful and unlawful acts when awarding damages.<sup>275</sup>

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<sup>270</sup> *Id.* at 809–11 (arguing that, although losses during armed conflict is a *prima facie* private law wrong, such losses are still justified if they conform to the standards set by the laws of war, because tort liability only arises when the loss is wrongful under the law rather than harmful).

<sup>271</sup> See *id.* at 810 (arguing that liability should only be imposed on “belligerent wrongs”).

<sup>272</sup> E.g., *Pingaro v. Rossi*, 731 A.2d 523 (N.J. Super. Ct. App. Div. 1999) (strict liability for dog bites); *Rylands v. Fletcher* [1868] 3 LRE & I. App. 330 (HL) (appeal taken from Eng.) (strict liability for reservoir); *Klein v. Pyrodyne Corp.*, 810 P.2d 917 (Wash. 1991) (strict liability for fireworks show); *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897 (Cal. 1963) (strict liability for products liability); see also *Reisman*, *Compensating*, *supra* note 16, at 4 (“Tort law in many jurisdictions now recognizes a state’s duty to compensate its own citizens for injuries suffered as a result of governmental actions which were not themselves wrongful.”); *id.* at 5–7 (discussing French, Israeli, and German examples).

<sup>273</sup> See Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 39–41) (arguing that “wartime conduct is often socially valuable yet extremely hazardous,” analogous to activities where domestic law imposes strict liability).

<sup>274</sup> See *supra* Section II.A.2.

<sup>275</sup> In the Armed Activities case, the International Court of Justice declined to assign a higher value to lives lost in deliberate attacks on civilians than to lives lost due to other reasons, because awarding “large per capita awards for non-material damage . . . would be

Nor would eliminating this distinction between lawful and unlawful acts for war torts purposes erode the distinction between lawful and unlawful acts more generally, just as holding a dog owner liable should their pet bite another does not erode the distinction between having a pet that acts unexpectedly and training a dog to attack others. War torts which are also war crimes will implicate individual criminal liability, and war torts which are also internationally wrongful acts will trigger states' obligations to make reparations.<sup>276</sup> Indeed, a war torts regime might even bolster extant accountability mechanisms. A war torts claim premised on an act that would also constitute a war crime might incur punitive as well as compensatory damages,<sup>277</sup> a consequence which would not be possible under the law of state responsibility alone.<sup>278</sup>

### 3. *Institutional Structures*<sup>279</sup>

What institutional structures would best achieve the aim of compensating civilians for their wartime harms? An international war torts regime could be developed within adversarial systems, with cases litigated before an impartial tribunal. Or it might be operationalized as a no-fault system like a claims commission, where the United Nations or individual states pay amounts into a fund which is then distributed to claimants.<sup>280</sup> Or it could be some combination of the two. Like the September 11th Victim Compensation Fund, it might

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inappropriate in a situation involving significant numbers of unidentified and hypothetical victims." Armed Activities, *supra* note 21, at ¶ 164. Similarly, the U.N. Compensation Commission provided lump sum payments to claimants for harms arising from Iraq's invasion and occupation of Kuwait without evaluating whether the losses were associated with international humanitarian law violations. U.N. COMP. COMM'N, *supra* note 197; Gillard, *supra* note 115, at 550–51. However, this is more of a practical than a legal precedent, insofar as ignoring this distinction was often justified on the grounds that the entire Iraqi operation was a *jus ad bellum* violation. *Id.* at 542; Wexler & Robbenolt, *supra* note 31, at 132–33.

<sup>276</sup> Hofmann, *supra* note 244, at 303 (noting that, while victims of lawful harm in armed conflict might have a right to compensation, "[c]are should be taken not to render the distinction between lawful and unlawful conduct meaningless" and that "[t]he fact that victims may be entitled to reparation for harm caused by lawful conduct does not mean that responsible parties are to be equally liable for consequences of lawful and unlawful conduct").

<sup>277</sup> Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 59–60).

<sup>278</sup> Cf. Armed Activities, *supra* note 21, ¶ 102.

<sup>279</sup> For elaboration on the respective characteristics and consequences of different institutional structures, see Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 8–26).

<sup>280</sup> See Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 22–23) (questioning whether payments should be compelled or voluntary, whether payments should be made at regular intervals or when a state is engaged in an armed conflict, and the extent to which payment amounts should vary depending on the state or activity).

allow claimants to pursue different paths to a remedy, depending on whether they seek a more personalized or more speedy result.<sup>281</sup> Or like the U.S. workers' compensation regimes, it might be some sort of hybrid system, which attempts to marry the best of a tribunal and no-fault system.<sup>282</sup> It could be established independently, like the International Criminal Court, or within the United Nations, like the International Court of Justice or the U.N. Compensation Commission.

Nor does creating a war torts regime require the creation of a new international institution. A limited version might grow from existing law: Characterizing situations where civilians already bring claims for compensation related to war crimes or other violations of international law as "war torts" would help develop it as a distinct concept. And any state could pass legislation creating a right for civilians to bring domestic tort claims for harms incurred due to a state's actions in armed conflict. Of course, comprehensive domestic war torts legislation would need to include a limited exception to foreign and forum state immunities.<sup>283</sup> Given how states guard these protections and the practical difficulties most individual claimants would have in bringing suit in a distant court, however, it would be far preferable to have an international institution.<sup>284</sup>

Regardless of how it is structured and whether it is operationalized internationally, domestically, or as some combination thereof,

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<sup>281</sup> See Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 130 (2002) (describing how claimants may choose either to participate in the fund or to preserve their right to sue in federal court).

<sup>282</sup> See, e.g., N.Y. STATE WORKERS' COMP. BD., CENTENNIAL: CELEBRATING 100 YEARS OF NEW YORK STATE WORKERS' COMPENSATION AND LEADING THE WAY FORWARD FOR THE NEXT CENTURY 4 (2014) (describing the New York workers' compensation board, which administers "a no-fault insurance system of medical care and lost wage benefits" and is "charged by law to ensure the claims of injured workers are processed quickly and equitably in the most cost-efficient manner").

<sup>283</sup> See *supra* note 176; cf. 28 U.S.C. §§ 1605A, 1605B (eliminating foreign state immunities for U.S. tort cases grounded on acts of international terrorism). Should a sufficient number of states create similar exceptions, the current customary international law establishing foreign state immunity for torts committed by their armed forces would erode, as the International Court of Justice found that rule to depend on state practice. See *Jurisdictional Immunities of State*, *supra* note 176, ¶¶ 55, 78, 91; see also Chimène L. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 234–35, 235 n.77 (2021) (discussing exceptions to foreign state immunities in U.S. law).

<sup>284</sup> States joining an international war torts regime would necessarily need to consent to its jurisdiction, solving the problem of state immunity. *But see infra* Section II.D.5 (discussing states' possible disinterest in establishing a war torts regime at all). And while an international institution wouldn't solve the practical difficulties individual claimants would face in bringing suit, it could formally or informally mitigate them. Formally, an implementing treaty could establish funds and mechanisms to assist potential claimants with suit. Informally, just by existing, an international institution would encourage the development and funding of nongovernmental efforts to assist individual claimants.

any institution evaluating war torts claims will need the ability to receive and process claims, the authority and competence to engage in fact finding and reach findings of law, and the means to make damage assessments and distribute or enforce damage awards.<sup>285</sup> Individuals within a war torts institution will also need to have legal knowledge and experience, as they will set critical precedents in the process of evaluating claims.<sup>286</sup>

#### 4. *Liability Standards*<sup>287</sup>

Should war torts be developed in adversarial tribunals, the extent of state liability will depend on whether a “strict liability” or “reasonable care” standard is employed. Strict liability imposes liability for caused harms, while reasonable care standards impose liability when an entity’s failure to exercise appropriate care in the circumstances causes harm. Selecting between the two entails selecting a default presumption regarding who bears the costs of harms that arise regardless of whether everyone acts with reasonable care. Under a strict liability standard, the entity who causes harm must shoulder those costs; under a reasonable care standard, they fall on the victims.<sup>288</sup>

In developing a victim-focused compensatory war torts regime, there is a heavy thumb on the scale in favor of strict liability.<sup>289</sup> In this context, strict liability fairly places costs on the entity which creates nonreciprocal risks to further its own interests;<sup>290</sup> incentivizes states to

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<sup>285</sup> Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 9–10) (discussing varied necessary and preferable institutional capabilities).

<sup>286</sup> See *infra* Section II.C.3 (discussing how these findings will contribute to legal development); Section II.E (identifying legal questions that will need to be addressed).

<sup>287</sup> For elaboration on the arguments for strict liability and against a reasonable care liability standard, see Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 9–10).

<sup>288</sup> See Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1235 (1988) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)).

<sup>289</sup> This Section focuses on doctrinal arguments, which support a strict liability standard. That being said, the most compelling argument for a reasonable care standard is a realist one, in that it is more likely to be accepted by states—and without state consent, there will be no war torts regime.

<sup>290</sup> Between the state which created nonreciprocal risks to achieve its own objectives and the (often foreign) civilian who bears the consequences, it is far more fair that the state shoulder the monetary costs associated with its actions. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 541–42, 548 (1972) (“If the defendant creates a risk that exceeds those to which he is reciprocally subject, it seems fair to hold him liable for the results of his aberrant indulgence.”); see also Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 343–44 (1996) (arguing that “the permissibility of a particular risk imposition depends on directly comparing the burdens that the untaken precaution imposes on the injurer’s freedom of

prepare for the costs of harmful activities<sup>291</sup> (and may also incentivize minimized engagement and greater care);<sup>292</sup> and eliminates significant evidentiary problems for claimants, such as the difficulty of providing evidence of a defendant state's failure to act with reasonable care or that such failure caused their harm.<sup>293</sup> In contrast, the difficulties claimants face in proving that a state failed to exercise reasonable care would effectively perpetuate the problematic status quo of little state liability.

To be sure, there are arguments for employing a reasonable care standard in some situations. First, a reasonable care standard might govern more types of harmful state conduct insofar as it would expand state liability to include the harmful consequences of third-party acts. For example, under the law of state responsibility, a private actor's conduct is attributable to a state only when the state "controls" them, a notoriously high threshold that often operates to minimize state responsibility.<sup>294</sup> If a similar attribution standard were employed in the war torts context, states would nearly never be liable for the harmful acts of non-state armed groups in their territory. However, a reasonable care or due diligence requirement could be used to hold states accountable whenever they could have influenced or stopped a private actor's harmful conduct and failed to take good-faith steps to do so.<sup>295</sup> Additionally, a reasonable care standard might apply differently to states with different capabilities, thereby "maintain[ing] the *legal* equality of belligerents along with taking into account the *factual* asymmetries that may affect their compliance with international humanitarian law."<sup>296</sup> In contrast, and depending on how a war torts

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action, with the burden that foregoing that precaution places on the security of prospective victims").

<sup>291</sup> See *supra* Section II.B.1 for a discussion of why the state is both the cheapest cost avoider and best cost spreader when compared with individual combatants. Similar arguments would apply when comparing the state to civilian victims.

<sup>292</sup> See Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 718 (1965) ("[O]ne of the functions of accident law is to reduce the cost of accidents, by reducing those activities that are accident prone."); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 3, 7, 11–12, 18–19 (1980); cf. Indiana Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1176–77 (7th Cir. 1990) (observing that strict liability may be preferred to negligence when taking extra care is unlikely to reduce the frequency of injury associated with an activity).

<sup>293</sup> See LANDES & POSNER, *supra* note 288, at 65–66; Marco Longobardo, *The Relevance of the Concept of Due Diligence for International Humanitarian Law*, 37 WIS. INT'L L.J. 44, 82 (2020) ("[S]ince states enjoy discretionary powers with respect to the conduct to be undertaken in order to fulfill a certain obligation, it may be difficult to scrutinize before a competent court the decision to adopt certain measures rather than others.").

<sup>294</sup> Draft Articles, *supra* note 21, art. 8.

<sup>295</sup> Longobardo, *supra* note 293, at 83.

<sup>296</sup> *Id.* at 85.

regime is structured, strict liability risks becoming yet another procedurally equal standard with differential effects.<sup>297</sup>

Ultimately, there is no need to take a hard line as to which standard will always be preferable; rather, as in domestic tort law, a war torts regime can accommodate both strict liability and reasonable care standards.<sup>298</sup> A state might be held strictly liable for harms caused by its own acts and subject to a reasonable care standard for acts of non-state actors. To the extent some might be concerned that holding states strictly liable for all of their wartime acts that cause civilian harm might result in “too much” state liability, that concern can be alleviated with limitations on pleading requirements, causation cut-offs, and affirmative defenses.<sup>299</sup>

### C. Indirect Benefits

My motivating reason in advocating for a war torts regime is to increase the likelihood that civilian victims can receive compensation for their harms. But every action has ripple effects; this Section teases out some of the attendant indirect benefits.<sup>300</sup>

#### 1. More Information About Civilian Harms in Armed Conflict

Researching, reporting, and advocating for change on civilian harms in armed conflict is maddening, in no small part because it is so difficult to establish basic facts. The nongovernmental organization Airwars estimated that, in approximately 175 U.S. strikes in Somalia over three years, 156 civilians were killed; U.S. Africa Command estimated that the same strikes resulted in just two civilian deaths.<sup>301</sup> Sim-

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<sup>297</sup> See *infra* Section II.D.4.

<sup>298</sup> Cf. Antonio Coco & Talita de Souza Dias, ‘Cyber Due Diligence’: A Patchwork of Protective Obligations in International Law, 32 EUR. J. INT’L L. 771 (2021) (detailing states’ varied “due diligence” obligations to prevent, stop, and redress harm, applicable in both cyber and the physical realms); Walton, *supra* note 227, at 1480 (arguing that “due diligence” obligations are best understood as a liability standard, rather than as a freestanding duty).

<sup>299</sup> Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 26–33, 35–59) (discussing claimant status and minimal harm requirements; considering the relative benefits of expansive and narrow causation analyses; and evaluating lawful action, mistake of fact, self-defense, contributory action, statute of limitations, peace treaty settlement, res judicata, and incapacity to pay affirmative defenses).

<sup>300</sup> There is extensive literature on the benefits of tort suits for claimants, especially when compared with criminal law proceedings. For a thorough review of many of these benefits and a host of relevant citations, see Bachar, *supra* note 31, at 382–86, 388–91.

<sup>301</sup> Luke Hartig, *What Counts as Sufficient Transparency on Civilian Casualties in Somalia*, JUST SEC. (Apr. 20, 2020), <https://www.justsecurity.org/69771/what-counts-as-sufficient-transparency-on-civilian-casualties-in-somalia> [<https://perma.cc/9AYF-4UU3>] (observing that both accounts “strain credulity”); see also Daniel R. Mahanty & Rita Siemion, *Grading DoD’s Annual Civilian Casualties Report: “Incomplete”*, JUST SEC. (May

ilarly, during the first two years of U.S. Operation Inherent Resolve, Airwars calculated that there were at least 1,500 civilian casualties; official U.S. assessments placed the number at 152.<sup>302</sup>

These discrepancies grow out of front-end categorization choices and information errors and back-end investigative differences. There has long been a disputed narrative that the U.S. government inappropriately considers all military-aged males near its air strikes to be combatants,<sup>303</sup> but even good-faith attempts to distinguish civilians can be inaccurate due to data errors. As Azmat Khan and Anand Gopal have described in their gripping reporting on the American-led campaign against ISIS, an untold number of civilian deaths go uncounted, mislabeled as enemy combatant killings.<sup>304</sup> Meanwhile, militaries and non-governmental organizations tend to take different approaches to post-strike investigations, which result in wildly different assessments. Military investigations often rely on internal and classified state sources, such as pre-strike information and post-strike videos; nongovernmental organizations generally conduct witness interviews, which generally result in higher casualty counts.<sup>305</sup>

Understanding the scope of a problem is critical to addressing it. Establishing a route to a remedy for war torts would encourage victims to bring claims, which in turn would expand our knowledge of

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7, 2020), <https://www.justsecurity.org/70063/grading-dods-annual-civilian-casualties-report-incomplete> [<https://perma.cc/A2ES-GW87>] (citing disparate civilian death counts associated with U.S. military operations by nongovernmental organizations and U.S. government-affiliated entities).

<sup>302</sup> Priyanka Motaparthy, *Why the US Military Needs to Rethink How It Investigates Civilian Harm*, JUST SEC. (Feb. 13, 2020), <https://www.justsecurity.org/68648/why-the-us-military-needs-to-rethink-how-it-investigates-civilian-harm> [<https://perma.cc/EC48-LE9K>].

<sup>303</sup> See Justin Elliott, *Dissecting Obama's Standard on Drone Strike Deaths*, PROPUBLICA (June 5, 2012), <https://www.propublica.org/article/dissecting-obamas-standard-on-drone-strike-deaths> [<https://perma.cc/8EBP-WMHX>]; John Vandiver, *AFRICOM Denies Amnesty International Claims that US Air Strikes Killed Civilians in Somalia*, STARS & STRIPES (Mar. 20, 2019), <https://www.stripes.com/theaters/africa/afrikom-denies-amnesty-international-claims-that-us-airstrikes-killed-civilians-in-somalia-1.573342> [<https://perma.cc/2AMG-33FN>] (quoting an Amnesty International report alleging that a U.S. general stated that “all military-aged males observed with known Al-Shabaab members” in specific areas are considered “legitimate military targets” and AFRICOM’s response that the purported statement “does not accurately reflect the targeting standards”).

<sup>304</sup> Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES MAG. (Nov. 16, 2017), <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html> [<https://perma.cc/UN8V-XXLP>] (“While some of the civilian deaths we documented were a result of proximity to a legitimate ISIS target, many others appear to be the result simply of flawed or outdated intelligence that conflated civilians with combatants.”).

<sup>305</sup> See Hartig, *supra* note 301.

civilian harms.<sup>306</sup> The articulation, independent investigation, and evaluation of these claims would (1) provide a wealth of information about the sources, kinds, and extent of civilian harms and (2) facilitate the comparison of military information and witness accounts, allowing “each source [to corroborate or refute] information from others until the most accurate conclusion possible under the circumstances is found.”<sup>307</sup> Additionally, the possibility of war torts liability would incentivize better record keeping, by states (to detail their compliance with legal obligations and to contest inaccurate claims) and possibly by civilians and their advocates (to detail harms).<sup>308</sup>

Improved information about civilian harms in armed conflict would be invaluable to civilians and their advocates, to militaries, and to anyone else working to better understand and minimize civilian harms in armed conflict.<sup>309</sup> For obvious reasons, harmed civilians often seek explanations for their experience and credible guarantees of non-repetition.<sup>310</sup> A more accurate understanding of civilian harms would provide these needed explanations and, as discussed in the next Section, might indirectly foster practices that would make guarantees of non-repetition more possible and credible.

## 2. Civilian Harm Mitigation and Reduction

Gillard has argued that requiring reparations for violations of international humanitarian law “can play a significant role in deterring future violations.”<sup>311</sup> Other scholars have gone one step further, suggesting that holding states liable for their harmful actions in armed

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<sup>306</sup> Bachar, *supra* note 31, at 383; cf. Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 328–35 (2018) (discussing tort law's information-forcing function in the automobile context); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 711–27 (2007) (discussing litigation's information-generating power and success in lowering informational asymmetry between tortfeasors and victims in the products liability context).

<sup>307</sup> Hartig, *supra* note 301.

<sup>308</sup> Bachar, *supra* note 31, at 410 (noting that, after a wave of lawsuits grounded in actions taken during the First Intifada, Israeli military “record keeping became much more rigorous”). Granted, this incentive would be lessened if a war torts regime was structured as a claims commission or other type of no-fault system, as states would not directly bear the costs of their actions. See Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 21, 22).

<sup>309</sup> E.g., DoD Memo on Civilian Harm, *supra* note 25 (outlining the Department of Defense's new instruction that will address, among other considerations, the DoD's transparency in assessing civilian casualty counts and new implementable practices to mitigate and respond to U.S. military-caused civilian casualties); cf. Fleck, *supra* note 33, at 198–99.

<sup>310</sup> See *supra* note 205 and accompanying text.

<sup>311</sup> Gillard, *supra* note 115, at 530.

conflict would incentivize them to both comply with the law and take more active steps to reduce lawful harm to civilians.<sup>312</sup>

To the extent that these writers envision military decisionmakers actively considering the possibility of war torts liability when making combat decisions, I disagree.<sup>313</sup> Further, I doubt states will create a war torts regime with costs that would pose a significant barrier to broader policy decisions.<sup>314</sup> Again, the creation of a war torts regime would depend on state consent, and states are unlikely to establish a compensatory regime that will significantly constrain their military freedom.<sup>315</sup>

But while the concrete costs of a war torts regime are unlikely to directly influence military decisionmaking, better information on the sources and scope of civilian harms may indirectly influence military policies and procedures. As states acquire more information, they will be better able to incorporate that knowledge into weapons research and development, weapons testing and review, troop training, crafting rules of engagement and best practices, and training a cadre of civilian casualty mitigation and reduction experts who will be able to propose additional policy and process improvements.<sup>316</sup> For example, accurate data on and analysis of the causes of civilian casualties in Afghanistan enabled senior leaders to implement measures to reduce civilian casualties and mitigate their effects.<sup>317</sup> The success of these reforms in minimizing civilian casualties prompted analysts to call for better civilian casualty data collection in all future operations.<sup>318</sup> But in the absence of legal consequences, it is unsurprising that even the most conscientious militaries continue to have few standardized procedures for conflict-free investigations, incomplete and inconsistently maintained records, and a bias against nonmilitary sources of informa-

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<sup>312</sup> See Ronen, *supra* note 28, *passim* (considering the varied incentives and consequences associated with holding states strictly liable for unintended civilian harms).

<sup>313</sup> See *infra* Section II.D.2.

<sup>314</sup> *Id.*

<sup>315</sup> See *supra* notes 213–15 and accompanying text.

<sup>316</sup> See Dickinson, *supra* note 250, at 71 (noting the import of domestic “experts within the government who internalize these values and foster a culture of broader compliance”).

<sup>317</sup> LEWIS, *supra* note 25, at 6.

<sup>318</sup> See *id.*; CTR. FOR EXCELLENCE IN DISASTER MGMT. & HUMANITARIAN ASSISTANCE, HANDBOOK ON BEST PRACTICES FOR CIVILIAN HARM MITIGATION AND RESPONSE IN U.S. MILITARY OPERATIONS 25–28 (2021) (highlighting areas essential to civilian harm and mitigation response efforts, including strategic guidance and the consideration of risks to civilian populations in planning, targeting, and collateral damage estimates), <https://www.cfe-dmha.org/LinkClick.aspx?fileticket=UAMt0rOk0HY%3d> [https://perma.cc/J8ZW-EWXW]; see also Wexler & Robbenolt, *supra* note 31, at 174–75, 174 nn.340–45 (calling for Civilian Casualty Tracking Analysis and Response (CCTAR) cells to be integrated into normal practice and part of mission planning and for the military to design policies based on the information gathered).

tion.<sup>319</sup> A war torts regime would provide states with more information about post-strike civilian casualties and thereby quietly encourage them to improve their pre- and post-strike practices.<sup>320</sup>

### 3. *Facilitating Legal Evolution and Harmonization*

Stepping back, a war torts regime would facilitate useful legal evolution. Within international humanitarian law, it would improve proportionality analyses, address the issue of differential state obligations, and encourage the information sharing necessary to the development of customary international humanitarian law. A war torts regime would also facilitate legal evolution in other international legal regimes: It would clarify the boundaries of international criminal law and refocus attention on the relevance of state responsibility for violations of international humanitarian law.

#### a. Legal Evolution Within International Humanitarian Law

There are a number of international humanitarian law quandaries that might be resolved by developing a war torts regime.

Most obviously, a war torts regime would help minimize the tension inherent in the proportionality analysis. When a commander weighs the benefits of a military operation against risks to foreign civilians, the proportionality analysis incentivizes minimizing the latter.<sup>321</sup> By fostering a greater understanding of the full range of civilian harm—to both individuals and to communities, in both the immediate aftermath and in long-term effects—a war torts regime could enable a more inclusive and complete balancing.

Simultaneously, war torts liability would counter problematic interpretative trends. For example, while the proportionality requirement prohibits “excessive” civilian harm, the Rome Statute requires a showing of “clearly excessive” civilian harm for criminal liability<sup>322</sup>—an appropriately higher standard, given the different goals of the two regimes.<sup>323</sup> Unfortunately, the latter interpretation is beginning to seep into the former, inappropriately narrowing the scope of the pro-

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<sup>319</sup> IN SEARCH OF ANSWERS, *supra* note 26; see also KOLENDA ET AL., *supra* note 25, at 11–13.

<sup>320</sup> See Bachar, *supra* note 31, at 410 (discussing how the possibility of Israeli suits fostered more rigorous record keeping, rules of engagement, and supervision of soldiers’ conduct); cf. Engstrom, *supra* note 306, at 328–35 (discussing the information-generating benefit of tort law); Wagner, *supra* note 306 (same).

<sup>321</sup> See generally *supra* notes 6–20 and accompanying text.

<sup>322</sup> Gaeta & Jain, *supra* note 85 (manuscript at 13).

<sup>323</sup> While international humanitarian law aims, among other things, to minimize needless civilian suffering, *see supra* Section II.A.1, international criminal law aims, among other things, to punish wrongdoers, *see supra* Section I.B.1.c.

tective prohibition.<sup>324</sup> War torts liability for all collateral damage would offset international criminal law's influence by providing an alternate pathway for evaluating proportionality, one which emphasizes that the relevant consideration is whether the attack would cause "excessive" harm (rather than "clearly excessive" harm).

Similarly, war torts liability might mitigate the consequences of interpreting civilian protections as not extending to civilian data. During the process of creating the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, a group of experts discussed whether a military operation that targeted civilian data would constitute a prohibited attack on a civilian object.<sup>325</sup> Reasoning that data was not an "object" because it was not visible or tangible, most decided that social security data, tax records, and bank accounts were not protected.<sup>326</sup> Given that military operations affecting data "could cause more harm to civilians than the destruction of physical objects,"<sup>327</sup> this conclusion has been roundly critiqued.<sup>328</sup> There are strong arguments for interpreting "civilian objects" to encompass civilian data, but should the alternative interpretation prevail, war torts liability would at least provide compensation for destroyed data.

The possibility of war torts liability might also help answer the recurring question of whether states with differential military and technological capabilities should have differentiated legal obligations. Scholars often question whether commanders have a legal duty to acquire or employ a more precise weapon when they have a choice among weapon systems.<sup>329</sup> However, there has been general resis-

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<sup>324</sup> Gaeta & Jain, *supra* note 85 (manuscript at 13) (observing that "a number of eminent IHL commentators now postulate that the proportionality rule under IHL itself requires clear excessiveness") (citation omitted). Nor is this trend necessarily limited to interpretations of the proportionality requirement. See *id.* at 13–16 (noting that other ambiguous international humanitarian law terms have been similarly narrowed).

<sup>325</sup> INT'L GROUPS OF EXPERTS, NATO COOPERATIVE CYBER CTR. OF EXCELLENCE, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS r. 100, at 437 cmts. 6–7 (Michael N. Schmitt ed., 2017).

<sup>326</sup> *Id.*

<sup>327</sup> INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 43 (2015), <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts> [https://perma.cc/T7CT-SA4Q].

<sup>328</sup> E.g., Robin Geiß & Henning Lahmann, *Protection of Data in Armed Conflict*, 97 INT'L L. STUD. 556 (2021).

<sup>329</sup> See, e.g., Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 FLA. L. REV. 1, 60–68 (2015) (considering this question in the context of drone warfare); Duncan B. Hollis, *Re-Thinking the Boundaries of Law in Cyberspace: A Duty to Hack?*, in CYBER WAR: LAW AND ETHICS FOR VIRTUAL CONFLICTS 24–26, 25 n.169 (Jens David Ohlin, Kevin Govern & Claire Finkelstein eds., 2015) (same, with regards to cyber operations); Christopher B. Puckett, *In This Era of "Smart Weapons," Is a State Under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?*, 18

tance to the idea—often from nationals of militarily powerful states—that different states should be subject to differential duties to employ more costly but safer means and methods of warfare.<sup>330</sup> A war torts regime that allocates costs directly to the state which caused harm would provide the Goldilocks solution: All states would have an equal duty to compensate victims of their accidents; as such, states that engaged in more war or employed means or methods of warfare that resulted in higher rates of civilian harm would bear a higher cost.<sup>331</sup>

Further, war torts liability might foster the development of customary international humanitarian law. Customary international humanitarian law evolves in fits and starts, in part because states tend not to publicize their internal military policies and practices. Even if a majority of states believe that a given action is legally required, and even if they all act accordingly, it is impossible to identify that practice as customary international law in the absence of public information about state beliefs and internal practices.<sup>332</sup> To the extent it increases transparency about states' legal stances and actual practices, a war torts regime might help break this detrimental silence.<sup>333</sup> For example, some have suggested that states have an obligation to investigate civilian harm.<sup>334</sup> If, through the fact finding necessary in evaluating war torts claims, states share information about their investigative practices, this proposed rule may gain weight and definition. Similarly, as states share information about their weapons reviews, information gathering methodologies, targeting policies, and investigation procedures, the international community will have more evidence to sup-

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EMORY INT'L L. REV. 645, 680–82 (2004) (same, with regard to precision-guided munitions).

<sup>330</sup> See Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 193–94 (2011). But see Schmitt, *supra* note 45, at 459–61 (2005) (arguing that the wording of Article 57 of the First Additional Protocol indicates that the precautions a state must take in attack are context-specific and therefore, “belligerents bear different legal burdens of care determined by the precision assets they possess”).

<sup>331</sup> This benefit would be lessened if war torts were operationalized as a claims commission or other no-fault system, as states would not directly bear the costs of their actions. Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 14–23).

<sup>332</sup> A rule is recognized as generally binding customary international law when a significant majority of states comply with it (the “state practice” requirement) in the belief that compliance is obligatory or permitted (the “*opinio juris sive necessitatis*” element). E.g., Int'l Law Comm'n, Identification of Customary International Law, pt. 2, U.N. Doc. A/CN.4/L.908 (May 17, 2018).

<sup>333</sup> *Id.* (discussing how a reasonable care liability standard would operate as a transparency-forcing mechanism and how an affirmative defense of lawful action might operate as a transparency-forcing mechanism).

<sup>334</sup> BREAU & JOYCE, *supra* note 28.

port the development of best practices and eventually recognize them as customary international law.<sup>335</sup>

b. Legal Evolution Outside of International Humanitarian Law

In addition to facilitating legal evolution within international humanitarian law, establishing a war torts regime would foster the development of international criminal law and the law of state responsibility.<sup>336</sup>

Building a war torts regime would better define the role of international criminal law. Tort and criminal law have different underlying purposes; accordingly, findings of liability have different implications. A criminal has done something prohibited; a tortfeasor has caused harm. It may be useful for states to have a clear distinction between war crimes and war torts, as that will allow states to accept causal responsibility for injurious but unintended harms without accepting blame for criminal acts.<sup>337</sup> For example, while the United States never admitted fault or publicly punished anyone for its mistaken 1988 downing of an Iranian passenger jet, it immediately expressed its willingness to compensate the victims' families<sup>338</sup> and ultimately paid them \$61.8 million.<sup>339</sup>

I don't want to overstate this distinction. Being named as a defendant or required to pay damages carries its own chastising sting,<sup>340</sup>

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<sup>335</sup> See, e.g., Longobardo, *supra* note 293, at 86–87, 87 n.240 (noting that German military authorities disclosed their decisionmaking process before German courts to demonstrate their compliance with the precautions requirement, which contributed to the development of international humanitarian law).

<sup>336</sup> These are hardly the only other legal regimes likely to be influenced. International human rights law, for example, wrestles with accountability questions regarding when states are responsible for reasonable but lethal errors, see Milanovic, *supra* note 54; see also CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT (2012); as a war torts jurisprudence develops, it will undoubtedly affect this and other analyses.

<sup>337</sup> Cf. Wexler & Robbennolt, *supra* note 31, at 172 (noting that, while a military is unlikely to make a statement that certain actions were unlawful, it might plausibly take causal responsibility—"that is, an acknowledgement that the military has acted in a way that has caused harm").

<sup>338</sup> Statement by Assistant to the President for Press Relations Fitzwater on United States Policy Regarding the Accidental Attack on an Iranian Jetliner over the Persian Gulf, 2 PUB. PAPERS 934–35 (July 11, 1988).

<sup>339</sup> Aerial Incident of 3 July 1988 (Iran v. U.S.), Settlement Agreement, 1996 I.C.J. 9 (Feb. 22), <https://www.icj-cij.org/public/files/case-related/79/11131.pdf> [https://perma.cc/YAQ5-HZBD]; see also Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992) (finding a suit against the United States based on these facts barred by sovereign immunity).

<sup>340</sup> Given this, it may be more politically palatable to develop a no-fault "mandatory condolence" bureaucracy rather than a "war torts" regime operationalized in tribunals. See Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 7) (noting that states

certain cultures equate acceptance of liability with acceptance of blame,<sup>341</sup> and assumptions of liability may easily be recharacterized as admissions of guilt by those interested in advancing such narratives.<sup>342</sup> Still, there is utility in differentiating between tort and criminal liability, as acceptance of tort liability can create de-escalatory means by which states may acknowledge their causal responsibility and compensate victims without losing (as much) face.<sup>343</sup>

As discussed above, in the absence of other accountability measures, many now look to criminal law to achieve aims it was never meant to accomplish.<sup>344</sup> The existence of war torts would allow for the appropriate categorization of a given act—as in domestic law, it might be a war crime, a war tort, both, or neither—which in turn would clarify the purpose and boundaries of international criminal law.

A war torts regime would also highlight the relevance of state responsibility for violations of international humanitarian law.<sup>345</sup> For the past seventy years, international criminal law advocates have been working to create and strengthen mechanisms to hold individuals accountable for their war crimes. While a laudable mission, the tendency of some to treat individual criminal accountability as the gold standard for accountability for harms in armed conflict risks “jettisoning critical parts of the broader [international humanitarian law] infrastructure which do not easily lend themselves to criminaliza-

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would be less likely to commit to a more robust war torts regime that holds individual states directly liable than a no-fault administrative system). Thanks to Lesley Wexler for this point.

<sup>341</sup> Wexler & Robbennolt, *supra* note 31, at 177.

<sup>342</sup> For example, the so-called “War Guilt Clause” in the Treaty of Versailles—which stated that Germany accepted responsibility for the losses and damages of World War I—was viewed as national humiliation and may have even factored into Hitler’s rise to power. Treaty of Versailles, *supra* note 240, art. 231; ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES xxiii (2000). However, the article itself was actually more akin to “an assumption of liability to pay damages than an admission of war guilt.” Robert C. Binkley & A.C. Mahr, *A New Interpretation of the “Responsibility” Clause in the Versailles Treaty*, 24 CURRENT HIST. 398, 398 (1926).

<sup>343</sup> See, e.g., Nathan Leys, Note, *Autonomous Weapon Systems, International Crises, and Anticipatory Self-Defense*, 45 YALE J. INT’L L. 377, 398 & n.120 (2020) (arguing that claims of mistake are politically de-escalatory).

<sup>344</sup> See *supra* Section I.B.1.c.

<sup>345</sup> Cf. Laurel E. Fletcher, *A Wolf in Sheep’s Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT’L LJ. 447, 460 (2016) (“[W]e have a fully articulated system of international criminal law, while there is no parallel system to enforce State responsibility for the same violations.”); Rebecca J. Hamilton, *State-Enabled Crimes*, 41 YALE J. INT’L L. 301, 313 (2016) (“While [international criminal law] is salient in the public imagination, with a list of shiny new institutions that have facilitated its rise to prominence, the law of State responsibility has been developing with comparatively little fanfare.”).

tion.”<sup>346</sup> Meanwhile, states have been content to shift accountability for both individual war crimes and more systemic violations of international humanitarian law to individual “bad apples.”<sup>347</sup> War torts liability would counter these trends by reinvigorating analyses of the structural causes of violations of armed conflict and highlighting the state’s role in facilitating or failing to prevent them.

### c. Legal Harmonization

International humanitarian law and international human rights law are often perceived as being in conflict, insofar as the selection between the applicable legal regime might alter a state’s legal obligations.<sup>348</sup> While discrepancies will remain, establishing a war torts regime could foster harmonization of these two bodies of law. Human rights law already requires a right to an effective remedy for rights violations;<sup>349</sup> developing an equivalent for harmful actions in armed conflicts would provide a means of fulfilling that obligation in times of armed conflict. Similarly, human rights law is developing a collective, societal right to truth regarding grave human rights violations;<sup>350</sup> war torts investigations would enable the collection and dissemination of this needed information.<sup>351</sup>

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<sup>346</sup> Gaeta & Jain, *supra* note 85 (manuscript at 16); see also Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice*, 80 U. COLO. L. REV. 327, 387–96 (2009) (highlighting the benefits of a regime in which the state can assume responsibility for wartime atrocities); Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331, 346–48 (2009).

<sup>347</sup> Cf. Fletcher, *supra* note 345, at 447 (“The rise of international criminal law is celebrated as an achievement of the international rule of law, yet its advance effectively may come at the expense of holding States accountable for their role in mass violence.”); Hamilton, *supra* note 345, at 302–06 (arguing for the recognition of “state-enabled crimes”—crimes in which the state plays an integral role—to address the fact that too often states evade liability for their contributions); Mohamed, *supra* note 346, at 390–94 (noting that “criminal prosecutions of a few individuals fail to acknowledge the role that the state plays in atrocities” and arguing for state responsibility for genocide).

<sup>348</sup> For example, the two legal regimes arguably proscribe different answers regarding the right to life, detention and the right to trial, women’s rights, and the rights to freedom of expression, association, and movement. Hathaway et al., *supra* note 136, at 1887–88. Accordingly, scholars and practitioners have explored when and how the two legal regimes might be interpreted to minimize conflict. E.g., *id.* at 1885–86.

<sup>349</sup> E.g., International Covenant on Civil and Political Rights, art. 2(3), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>350</sup> Tamar Ezer, The Collective Dimension of Human Rights 14 (Jan. 27, 2022) (unpublished manuscript) (on file with author); see also Off. of the U.N. High Comm’r for Hum. Rts., *Study on the Right to Truth: Promotion and Protection of Human Rights*, ¶ 34, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006).

<sup>351</sup> See *supra* Section II.C.1.

#### D. Critiques and Challenges

The road to hell is paved with stories of attempted social fixes that were either dangerously ineffective or facilitated other, more significant problems. I have already alluded to the potential concern that a war torts regime would tip the “balance” between humanity and military necessity too far in favor of the former.<sup>352</sup> This Section considers additional counterarguments to creating a war torts regime and concludes that, although there are some concerns that may not be resolved even in the most idealized implementations, the benefits of changing the status quo outweigh the challenges and risks.

##### 1. Tort Law Wasn’t Designed for Armed Conflict

Many have observed that domestic tort law is “ill-equipped to handle the unique set of risks involved in combat.”<sup>353</sup> In defending state immunity for civilian harms in armed conflict, U.S. Judge Stephen Reinhardt noted that “tort law is based in part on a desire to secure justice—to provide a remedy for the innocent victim of wrongful conduct.”<sup>354</sup> He concluded that, because “[w]ar produces innumerable innocent victims of harmful conduct—on all sides,” it “would make little sense to single out for special compensation a few of these persons—usually enemy citizens—on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other.”<sup>355</sup> Similarly, Israeli Justice Aharon Barak justified retaining state immunity for combat activities on the grounds that “ordinary tort laws are not intended to cope with acts that cause injury in the course of war actions . . . in the framework of an armed conflict” and that the “objectives underlying the ordinary tort laws do not apply when the injury results from a war action that the State is conducting against its enemies.”<sup>356</sup>

Certainly, ordinary tort laws were not designed to address the harms associated with modern armed conflict.<sup>357</sup> But, as Gilat Bachar points out, nor was international humanitarian law.<sup>358</sup> Just as legal

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<sup>352</sup> See *supra* Section II.A.1.b.

<sup>353</sup> Bachar, *supra* note 31, at 394; see also Witt, *supra* note 170, at 1467 (noting the difficulty with aligning domestic tort law doctrines with a state’s strategic aims in armed conflict, given that the former was “hardly designed with the functional imperatives of the military in mind”).

<sup>354</sup> *Koohi v. United States*, 976 F.2d 1328, 1335 (9th Cir. 1992).

<sup>355</sup> *Id.*

<sup>356</sup> HCJ 8276/05 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Defense*, 62(1) PD 1, 26 (2006) (Isr.).

<sup>357</sup> Witt, *supra* note 170, at 1467.

<sup>358</sup> Bachar, *supra* note 31, at 422.

actors drew on domestic criminal law concepts to establish international war crimes, we can draw on domestic tort law concepts to develop international war torts.<sup>359</sup> And while it would hardly “secure justice” to single out only a few injured civilians for special compensation, neither tort law concepts nor the armed conflict context requires such a restriction. As evidenced by the BP oil spill fund, Iran–United States Claims Tribunal, and asbestos, opioid, and other mass tort litigation, tort law regularly creates regimes to provide individualized compensation to “innumerable” victims.<sup>360</sup> Further, the ICC Trust Fund for Victims has made individualized payments to 740 beneficiaries in accordance with the requirements of the *Al Mahdi* holding, demonstrating the feasibility of individualized reparations in the armed conflict context.<sup>361</sup>

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<sup>359</sup> Cf. Gabriella Blum & John C. P. Goldberg, *The Unable or Unwilling Doctrine: A View from Private Law*, 63 HARV. INT'L L.J. 63, 108 (2022) (“[T]here are good reasons to look to private law to illuminate possible choices for the interpretation and application of international law relating to responsibility and liability.”).

<sup>360</sup> See, e.g., Matt Sledge, *A Near-Decade After BP Oil Spill, Now-Public Payout Claims Run Gamut — Including an Ex-NBA Star*, NOLA.COM (July 2, 2019, 4:07 PM), [https://www.nola.com/news/business/article\\_872a7ed6-9cf3-11e9-9055-7b30798f21b4.html](https://www.nola.com/news/business/article_872a7ed6-9cf3-11e9-9055-7b30798f21b4.html) [https://perma.cc/D6P7-RGCV] (“As of July 1, more than 260,000 private parties had submitted claims [regarding the BP oil spill], and the company had paid nearly \$12 billion to more than 130,000 unique claimants, according to the Deepwater Horizon Claims Center.”); *Iran-U.S. Claims Tribunal*, U.S. DEPT’ OF STATE, <https://www.state.gov/iran-u-s-claims-tribunal> [https://perma.cc/GP9D-SETG] (“Almost all of the approximately 4,700 private U.S. claims filed against the Government of Iran at the Tribunal have been resolved and have resulted in more than \$2.5 billion in awards to U.S. nationals and companies.”); Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. ECON. PERSPS. 183, 196 (2004) (noting that when asbestos companies go bankrupt, they often set up “a compensation trust” responsible for paying present and future asbestos claims); Mullenix & Stewart, *supra* note 281, at 133–34 (discussing the National Childhood Vaccine Injury Act, a “no-fault compensation program for childhood vaccine-injury victims,” each of whom is awarded a \$250,000 grant); *id.* at 136–38 (discussing the Swine Flu Act, which established an exclusive means of recovery for swine flu inoculations); *id.* at 144–46 (discussing the Black Lung Benefits Act, which created a Trust Fund for coal miners who become disabled due to pneumoconiosis). However, the provision of individualized awards does not ensure that those awards will be compensatory. See, e.g., Martha Bebinger, *The Purdue Pharma Deal Would Deliver Billions, but Individual Payouts Will Be Small*, NPR (Sept. 28, 2021), <https://www.npr.org/2021/09/28/1040447650/payouts-purdue-pharma-settlement-sackler> [https://perma.cc/A2GM-XH8U] (noting that many of the individualized payments from the historic opioid settlement are more symbolic than compensatory).

<sup>361</sup> THE TRUST FUND FOR VICTIMS, TFV MANAGEMENT BRIEF Q3/2021 11 (2021). Similarly, “[t]he U.N. Compensation Commission offer[ed] relief to large numbers of individual claimants through comparatively simple and expeditious administrative procedures, which may suggest [a war torts regime] can be successful.” Bachar, *supra* note 31, at 387 n.51.

## 2. Might States Be Over-Deterred?

Some might be concerned that requiring states to pay for civilian harms might over-deter them from waging war.<sup>362</sup> (Others, of course, would consider this an unalloyed benefit. Still others question whether traditional law and economic analyses can be applied to states at all, given that they are far from rational actors.<sup>363</sup>)

This may not be a problem, as—to use the language of law and economics—it is far from clear that states are currently engaging in “optimal” amounts or types of armed conflict. In the absence of having to internalize the full costs of their activities, states may well be using force too often. Certainly, to the extent the prospect of being “named and shamed” by a direct suit or having to pay damages deters states from unlawful aggressive acts, that deterrence serves the broader aims of the U.N. Charter.<sup>364</sup>

However, states will probably not create a war torts regime that would significantly constrain their military decisionmaking. Most obviously, when a state’s security is at stake, it is unlikely to be dissuaded from taking defensive action by the prospect of future tort claims. Additionally, the possibility of future state liability will hardly be a pressing factor when combatants are making decisions in the midst of a conflict, especially as they are often far removed from the government agents who would handle the resolution of war torts claims. Anecdotal evidence seems to support this intuition: After discussing Israeli civilian compensation payments with members of the military, legislators, and government lawyers, Abraham found that “state actors have expressed that neither the possibility of an imposition of tort liability nor actual instances in which it was imposed influence their decisions about whether to engage in belligerent activities or how to conduct them.”<sup>365</sup> Instead, security concerns predominate.<sup>366</sup> This suggests that even civilian compensation regimes operationalized through adversarial processes can be structured in ways that do not over-deter common state military actions.

Further, although the lack of data on the actual extent of civilian harms in armed conflict makes it difficult to predict how much war

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<sup>362</sup> See THOMAS TUGENDHAT & LAURA CROFT, THE FOG OF LAW: AN INTRODUCTION TO THE LEGAL EROSION OF BRITISH FIGHTING POWER 54 (2013) (arguing that law has overburdened the process of waging war).

<sup>363</sup> Cf. Ronen, *supra* note 28, at 195 (suggesting that, to the extent states are not rational actors or motivated by economic considerations, imposing economic costs for civilian harms might not operate to deter harmful state action).

<sup>364</sup> U.N. Charter art. 2, ¶ 4; see also Ronen, *supra* note 28, at 202.

<sup>365</sup> Abraham, *Combatant Activities*, *supra* note 122, at 30.

<sup>366</sup> *Id.* at 13–14.

torts would cost, it is possible for states to construct an adversarial or no-fault compensatory regime that will simultaneously change victims' lives and have little impact on state budgets. Again, Israel's experience is instructive. From 1988 through 2014, Israel allowed suits against the state for harm caused by military and security personnel to civilians.<sup>367</sup> During this time, it paid roughly \$93 million in compensation for acts by its security forces against Palestinians in the West Bank and Gaza Strip and an additional \$20 million in reparations to the families of those killed during Israel's takeover of the *Mavi Marmara* aid flotilla.<sup>368</sup> During this same time period, Israel spent approximately \$268 billion on military expenditures, rendering its compensatory payments roughly 0.0004% of its military budget.<sup>369</sup> As one Israeli government lawyer noted, "These cases are peanuts."<sup>370</sup> Of course, an amount that may be trivial to one state may be prohibitive for another, but that merely suggests that a war torts regime should adjust for state belligerence, wealth, or military expenditures in some manner—not that costs will over-deter states from taking necessary action or that states shouldn't be liable for war torts at all.<sup>371</sup>

However, the reputational cost of being named as a defendant or the risk of future costs may deter states from engaging in other, less obviously necessary military activities. For example, liability concerns may limit states' willingness to participate in humanitarian interventions or peacekeeping missions, possibly to the detriment of the international order.<sup>372</sup> This concern might be alleviated by establishing state immunity for actions authorized by the Security Council,<sup>373</sup>

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<sup>367</sup> *Id.* at 23.

<sup>368</sup> *Turkey Says Israel Paid Compensation to Families of 2010 Flotilla Raid Victims*, REUTERS (June 23, 2017), <https://www.reuters.com/article/us-turkey-israel-compensation-turkey-says-israel-paid-compensation-to-families-of-2010-flotilla-raidvictims-media-idUSKBN19E166> [https://perma.cc/3HG2-59T3].

<sup>369</sup> *Military Expenditures (Current USD) – Israel*, WORLD BANK, <https://data.worldbank.org/indicator/MS.MIL.XPND.CD?end=2019&locations=IL&start=1960&view=chart> [https://perma.cc/YTQ7-GBYJ]. While Israeli legislators slowly limited the state's liability, they were less motivated by cost concerns than the political issue of paying state funds to enemies of the state. Abraham, *Combatant Activities*, *supra* note 122, at 23.

<sup>370</sup> Abraham, *Combatant Activities*, *supra* note 122, at 25.

<sup>371</sup> See Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 58) (discussing the possibility of an "incapacity to pay" defense); see also Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 MOD. L. REV. 1246 (2020) (arguing that states should not be obligated to pay compensation when doing so would incapacitate the state or its people).

<sup>372</sup> Ronen, *supra* note 28, at 203–04.

<sup>373</sup> The United Nations itself enjoys absolute immunity, though states acting under a U.N. flag may incur liability. Cf. Rb.'s-Gravenhage, 10 juli 2008, 295247/HA ZA 07-2973, (Mothers of Srebrenica/Netherlands) (Neth.), ¶¶ 5.5, 5.6, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2008:BD6796> [https://perma.cc/JC7U-E95K] (confirming prior caselaw that the United Nations was entitled to immunity from plaintiffs'

which would avoid creating a loophole for unilateral “humanitarian interventions” while reaffirming the import of Security Council authorization. To ensure that civilians harmed in the course of its operations may still receive compensation, the Security Council might be required to set aside dedicated funds when approving a mission.

### 3. *The Risks of “Pricing” Harms*

If tort law “prices” harmful acts—as opposed to criminal law, which prohibits them<sup>374</sup>—there is a risk that establishing costs for civilian harms might simultaneously legitimize and render them just a “cost of doing business.”<sup>375</sup> Even more cynically, if a state can brush aside critiques of harmful acts by providing compensation, a war torts regime might indirectly incentivize more collateral damage.<sup>376</sup>

Consider the Israeli daycare study, in which a daycare began fining parents who arrived late to pick up their children.<sup>377</sup> Prior to the introduction of this fine, there was an informal social contract, where parents who arrived late presumably felt guilty for doing so.<sup>378</sup> Once the fine was introduced, however, parents began “pricing” their lateness and were more frequently tardy.<sup>379</sup> When the daycare removed the fine a few weeks later, parents kept coming late, and researchers posited that the reason why was that the social contract had been broken.<sup>380</sup> Might a similar switch—from a moral imperative to minimize civilian harm to a market mentality—accompany the introduction of a war torts regime?

It is possible, however, that the current proportionality analysis may have already substituted a market-based cost-benefit assessment for a social norm.<sup>381</sup> For example, an investigative report on the U.S.

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claim for compensation for defendants’ failure to prevent a genocide and finding the Netherlands partially liable).

<sup>374</sup> John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194 (1991); see also Calabresi, *supra* note 292, at 718–19 (discussing the tort system’s “pricing” of accidents).

<sup>375</sup> Bachar, *supra* note 31, at 412; cf. Wexler & Robbennolt, *supra* note 31, at 178 (observing that, in some cultures, being too willing to pay damages may be perceived as indicating a lack of regret).

<sup>376</sup> See Ronen, *supra* note 28, at 197 (noting the possibility that payments implicitly sanction civilian harm).

<sup>377</sup> Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 4 (2000).

<sup>378</sup> *Id.* at 13–14.

<sup>379</sup> *Id.* at 14.

<sup>380</sup> *Id.*

<sup>381</sup> See Thomas Gregory, *Calibrating Violence: Body Counts as a Weapon of War*, EUR. J. INT’L SEC., 2022, at 1, 3, 9–10, <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/567549CBA1C315F25E56354CB030888D/S2057563722000074a.pdf/calibrating-violence-body-counts-as-a-weapon-of-war.pdf> [https://perma.cc/YF4L-ER2C]

Marine Corps's failure to investigate a November 2005 attack that killed twenty-four unarmed Iraqis noted:

Statements made by the chain of command during interviews for this investigation, taken as a whole, suggest that Iraqi civilian lives are not as important as US lives, their deaths are just *the cost of doing business*, and that the Marines need to "get the job done" no matter what it takes.<sup>382</sup>

If we are already in a world of market-based thinking, where commanders are weighing the anticipated civilian harm against the benefit of achieving an anticipated military objective, putting a quantifiable price on civilian harm is preferable to not doing so. The absence of war torts suggests that civilian harms are being systematically undervalued in the proportionality analysis; adding a cost might correct that imbalance. Indeed, one critique of the Israeli daycare study's conclusions is that the fine was simply too low to adequately deter the undesired behavior.

Second, creating a war torts regime will not eliminate the other "costs" of harming civilians. Individuals who harm others will still bear the moral scars, and those who intentionally or recklessly violate the law will still be subject to criminal liability. States will still be required to comply with international humanitarian law's varied obligations, states which fail to do so will incur obligations under the law of state responsibility, and states which cause civilian harm will still take reputational hits.<sup>383</sup> Ideally, a war torts regime would be designed to bolster, rather than undermine, existing legal requirements and reputational and legal enforcement mechanisms.<sup>384</sup>

Between the status quo, where law legitimates state actions that cause civilian harm without having to provide compensation, and a potential future where law legitimates state actions that cause civilian harm but requires states to pay compensation for that harm, I choose the latter.<sup>385</sup>

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(arguing that coalition counts of civilian casualties framed them as a strategic problem and a tool for calibrating violence, rather than as a moral or legal concern); Ronen, *supra* note 28, at 197 ("The law as it stands today already suggests that life and bodily integrity . . . may be balanced against other interests.").

<sup>382</sup> Mullaney & Regan, *supra* note 68, at 92 (emphasis added) (quoting ELDON A. BARGEWELL, HADITHA INVESTIGATIVE REPORT (2006)).

<sup>383</sup> Ronen, *supra* note 28, at 208; see also Gregory, *supra* note 381, at 16 (discussing how the U.S. military perceived Afghan civilian harm as a strategic problem, as alienating the local population made mission success more difficult).

<sup>384</sup> See *supra* notes 276–78 and accompanying text.

<sup>385</sup> Of course, these are not the only two options. While some might critique this proposal as going too far, see *supra* Section II.D.2, others might critique it for not going far enough, for being insufficiently abolitionist. Instead of attempting to patch international humanitarian law's accountability gap, perhaps instead we should recognize how it fosters

A related concern is that, in attempting to value civilian harm, evaluators will focus on quantifiable harms and devalue unquantifiable ones. Undervaluing unquantifiable harms is a global issue for tort law. One of the most painfully inaccurate but enduring tort law concepts is that compensatory damages make a plaintiff whole. But anyone who has suffered real pain and loss would prefer to rewind the clock, forgo the remedy, and avoid the harm in the first place. “Compensatory” awards do not fully compensate the victim; instead, they make it slightly easier to bear the weight of the incalculable loss.<sup>386</sup>

#### 4. Power Disparities

International rules are often critiqued on the grounds that they further entrench longstanding power dynamics, privileging wealthy and powerful states at the expense of others. If designed in ways that make it asymmetrically more difficult for states with fewer resources to engage in armed conflict or for nationals from such states to receive compensation, a war torts regime risks joining the list of international systems that purport to protect the weak while actually favoring the most powerful.<sup>387</sup>

Depending on how a war torts regime is structured, problematic power dynamics might manifest in various ways.<sup>388</sup> If war torts develop within adjudicatory institutions, wealthier states will be better situated to bring and argue claims and pay judgments. Not only will they be better resourced, “[l]arger states have a greater capacity to vindicate their legal claims through the projection of power than do

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and legitimizes problematic power relations and activities, *see* Samuel Moyn, *Civil Liberties and Endless War*, DISSENT, <https://www.dissentmagazine.org/article/civil-liberties-and-endless-war> [https://perma.cc/H9YY-8ZSJ] (arguing that an emphasis on minimizing civilian casualties results in “tolerat[ing] the normalization of perpetual, if more sanitary, war”); Lieblich, *supra* note 23; *infra* Section II.D.4; *cf.* Gregory, *supra* note 381 (claiming that arguments for minimizing civilian casualties are problematic because (1) the moderation of violence enables violence, (2) counting casualties reinforces the illusion of bureaucratic control over intractable issues, and (3) strategic (rather than moral or legal) arguments implicitly encourage not counting casualties when it is not strategically useful), and work to dismantle the system entirely, Maryam Jamshidi, *Bringing Abolition to National Security*, JUST SEC. (Aug. 27, 2020), <https://www.justsecurity.org/72160/bringing-abolition-to-national-security> [https://perma.cc/M7HG-WLFA].

<sup>386</sup> A related concern is that requiring payment might detract from the emotional power of a voluntary gift. That may be true, but a war torts regime simply provides a floor: States remain free to make *ex gratia* payments in addition to any legally compelled ones.

<sup>387</sup> Cf. SAM MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018) (discussing how a focus on human rights has obscured the import of social and economic rights).

<sup>388</sup> See *supra* Section II.B.3 (discussing potential institutional structures); Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 14–17) (same, in greater detail).

their smaller counterparts.”<sup>389</sup> Alternatively, if there is some form of claims commission that dispenses monies, its funding will raise questions of how much each state should contribute: Should payments depend on state wealth? Net military expenditures or military expenditures as a percentage of its GDP? The number or types of armed conflicts the state engages in, on average or in a given year? Or perhaps the entire endeavor should be funded by the United Nations, out of its broader budget?

Damage assessments may also work out unequally. If there are set compensation tables for different types of civilian harms, any given harm will be relatively “cheap” for wealthier states. If the cost of a civilian life is fixed at a certain amount, it will be easier for some states to pay it. Alternatively, if different lives are valued differently, perhaps by being based on the individual’s anticipated earning potential, the lives of certain nationals’ lives will be “worth” more, a morally distasteful conclusion.<sup>390</sup>

There is no clear way to untie this Gordian knot. Those who are charged with structuring a war torts regime and those who evaluate claims and award damages must keep these concerns in mind and do what they can to balance consistency with flexibility and mitigate disparities—and, where possible, to minimize some of the inequalities enabled by extant law.

Again, though, change is preferable to the status quo, particularly in a world where military powers regularly engage in remote armed conflicts and populations in relatively weak states routinely shoulder the costs of relatively powerful states’ military activity.<sup>391</sup>

## 5. A Lack of State Interest

International law is made by and for states; accordingly, the largest barrier to developing a war torts regime will be states’ unwillingness to incur costs for previously costless activities.

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<sup>389</sup> GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES 46 (2004).

<sup>390</sup> This issue plagues American tort law, where damage amounts have traditionally been determined based on demographic tables that result in discriminatory outcomes. See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010) (delineating how American tort law places particular social groups at greater risk for certain types of injuries); see also Rowell & Wexler, *supra* note 17, at 568 (noting that this individualized approach creates higher administrative costs).

<sup>391</sup> Cf. Hamilton, *supra* note 345, at 334 (noting that “powerful states regularly impose measures, from economic sanctions to military incursions,” in ways that enable them to selectively target “those who are disfavored, while leaving themselves and their allies free from sanction whenever they play a role in State-Enabled Crimes” such that “citizens of the weakest states . . . regularly absorb the costs of their state’s role in State-Enabled Crimes that citizens of powerful states do not”).

I could attempt to make the argument that war torts are in states' best interest. The fact that a few states already make voluntary payments after causing civilian harm provides potential support<sup>392</sup>: Certainly, these states recognize that making monetary amends serves a purpose. The U.S. Congress, for example, enacted the Foreign Claims Act—under which the United States sometimes voluntarily allows foreign civilians to bring suit against it for noncombat harms caused by its military forces—in order “[t]o promote and to maintain friendly relations” with other countries.<sup>393</sup> Subsequently, “in every conflict from Vietnam to Somalia, the U.S. Army has tried to get around the restrictive nature of the [Foreign Claims Act]’s combat exclusion in order to pay condolences” to individuals harmed by military operations.<sup>394</sup> This may be because, as many argue, providing amends for both lawfully and unlawfully caused harms is a strategic move, particularly in counterinsurgency environments.<sup>395</sup> Lesley Wexler and Jennifer Robbennolt add that amends may also address the moral injury suffered by combatants who harm civilians, as well as reinforce military professionalism.<sup>396</sup>

Despite extended civil society campaigns for permanent and comprehensive amends mechanisms, however, most states do not provide compensation for civilian harm—even unlawful harm.<sup>397</sup> And the few states that do provide compensation resist any characterization of their payments as obligatory. The United States frequently reiterates that its *ex gratia* payments “are not legally required,” both in public documents and when dispersing funds to individuals.<sup>398</sup> Similarly, the

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<sup>392</sup> In October 2020, for example, the Dutch Minister of Defence voluntarily earmarked over 4 million euros for the community of Hawija, in recognition of the extensive civilian harm following 2015 strikes. Press Release, Ministry of Defence, Compensatieprojecten voor gemeenschap Hawija starten in 2021 [Compensation Projects for Hawija Community to Start in 2021] (Dec. 15, 2020), <https://www.defensie.nl/actueel/nieuws/2020/12/15/compensatieprojecten-voor-gemeenschap-hawija-starten-in-2021> [https://perma.cc/X8ZU-7MCQ]; see also *supra* Section I.C.3 (discussing *ex gratia* payments).

<sup>393</sup> 10 U.S.C. § 2734(a) (2012).

<sup>394</sup> SITARAMAN, *supra* note 7, at 52.

<sup>395</sup> E.g., Wexler & Robbennolt, *supra* note 31, at 128, 160–67; see also sources cited *supra* note 25. But see Gregory, *supra* note 381.

<sup>396</sup> Wexler & Robbennolt, *supra* note 31, at 128, 162–67; see also Rowell & Wexler, *supra* note 17, at 543–44 (noting that all states have joined treaties requiring them to sometimes value foreign lives at the risk to domestic ones in military engagements, and suggesting four domestic benefits—improved military discipline, reciprocity concerns, commitment to humanitarian principles, and reputational benefits—for this seemingly counterintuitive commitment).

<sup>397</sup> Wexler & Robbennolt, *supra* note 31, at 137.

<sup>398</sup> As detailed in a recent U.S. memorandum, these payments do not constitute “an admission or an acknowledgement of any legal obligation to provide compensation, payment, or reparations” for U.S.-caused civilian harms. DoD Memo on Condolence Payments, *supra* note 186. Instead, the memo notes, “U.S. domestic law and the law of war

Canadian Federal Treasury Board's Policy notes that *ex gratia* payments are relevant only when "the Crown has no obligation of any kind or has no legal liability, or where the claimant has no right of payment or is not entitled to relief in any form,"<sup>399</sup> and Australia's relevant statute authorizes "'act of grace' payments in circumstances in which the Commonwealth considers it has a moral, rather than legal obligation, to provide redress."<sup>400</sup> Even when the United States paid China after bombing the Chinese Embassy in Belgrade, arguably as required by the law of state responsibility for an internationally wrongful act, the United States maintained that "the compensation was voluntary and not an admission of American liability."<sup>401</sup>

Clearly, states are interested in retaining room to maneuver—perhaps especially when payments might go towards foreign civilians who support an enemy state during an ongoing conflict.<sup>402</sup> Given this, even the most ardent amends advocates believe that arguments that compensation is or should be legally required will remain a fantasy for the foreseeable future.<sup>403</sup>

Even though I believe a comprehensive and effective war torts regime could serve state interests, I am under no illusion that states will jump to create it. This is hardly a fertile time to propose any new international legal regime, let alone one that would impose new costs.<sup>404</sup>

That being acknowledged, the growing international conversation around regulating autonomous weapon systems might provide an ideal environment for introducing a tech-specific form of war torts liability.<sup>405</sup> Because they are able to select and engage targets without human intervention—which is to say, without any human acting with

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do not require the United States to assume liability and compensate individuals for injuries to their person or personal property caused by its lawful combat operations." *Id.* at 2.

<sup>399</sup> TREASURY BD. OF CAN. SECRETARIAT, GUIDE TO EX GRATIA PAYMENTS AND HONORARIUMS § 3.1 (2019).

<sup>400</sup> Ronen, *supra* note 28, at 215 (citing *Financial Management and Accountability Act 1997* (Cth) s 33(1) (Austl.)).

<sup>401</sup> Seth Faison, *U.S. to Pay China for Embassy Bombing*, N.Y. TIMES (July 31, 1999), <https://www.nytimes.com/1999/07/31/world/us-to-pay-china-for-embassy-bombing.html> [https://perma.cc/8WT7-EYJ7].

<sup>402</sup> Wexler & Robbennolt, *supra* note 31, at 168; see also Abraham, *Combatant Activities*, *supra* note 122, at 22–24 (noting that those interested in expanding Israeli combatant activities immunity disliked that the compensatory payments were going to perceived foes).

<sup>403</sup> Wexler & Robbennolt, *supra* note 31, at 168.

<sup>404</sup> Cf. GUILLAUME LAGANIÈRE, LIABILITY FOR TRANSBOUNDARY POLLUTION IN PRIVATE INTERNATIONAL LAW: A DUTY TO ENSURE PROMPT AND ADEQUATE COMPENSATION 1–12 (2020) (discussing the failure to create international tort remedies for environmental damage, despite decades of civil society activism).

<sup>405</sup> Crootof, *Accountability for Autonomous Weapons*, *supra* note 32, at 1400–02.

the requisite mens rea for a war crime—autonomous weapon systems raise unique and pressing accountability questions.<sup>406</sup> It seems likely that when the inevitable accident involving an autonomous weapon system results in significant death and destruction, there will be persistent and public calls for responsibility.<sup>407</sup> In the absence of a war torts regime, criminal law will likely be interpreted to create ex post liability for a “war crime,” despite the fact that no human will have acted with the requisite mens rea.<sup>408</sup> Accordingly, as I have detailed previously, “[t]he alternative to tort liability will not be no liability—instead, it will likely be expanded criminal liability,” a morally questionable and legally problematic result.<sup>409</sup> Exploring state liability for civilian harms within the limited context of autonomous weapon systems might be an appealing way for states to test-drive a war torts regime.<sup>410</sup>

Ultimately, regardless of whether there is currently a lack of state interest in establishing a war torts regime, the concept is worth exploring. There is utility in drawing attention to the accountability gap at the heart of international humanitarian law, articulating a theoretically and normatively sound means of addressing it, and allowing the idea to percolate and develop.<sup>411</sup>

### E. Unanswered Questions

There are two sets of questions which are beyond the scope of this introductory Article: internal implementation questions for a war torts regime and omnipresent questions for international humanitarian law.

First, there are the internal questions on how best to implement a war torts regime. What institutional structure is preferable? Who should be able to bring a claim—states, individuals, third-party representatives? Which evidentiary standards and burden-shifting presumptions should apply? What kind and amount of harm must be shown? What standard of liability should be employed? How should causation be evaluated? What affirmative defenses are permissible? What remedies should be available? When are punitive damages appropriate? How should liability be apportioned among “joint war tortfeasors,”

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<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 1401.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> See *id.* at 1389–96 (discussing why strict liability for states is particularly appropriate for the actions of fielded autonomous weapon systems).

<sup>411</sup> Cf. *The Overton Window*, MACKINAC CTR. FOR PUB. POL’Y, <https://www.mackinac.org/OvertonWindow> [https://perma.cc/Y8RY-NHLL] (discussing how once-unthinkable policy concepts can become mainstream).

such as states acting together in coalition strikes or opposing forces which both arguably caused a given harm? I have alluded to these issues throughout this paper, but I explore them and related implementation questions more thoroughly in a second article.<sup>412</sup>

Second, there are questions which are relevant to shaping a war torts regime, but which intersect with other evolving and unresolved issues in international humanitarian law. These include the questions of when an armed conflict formally begins or ends,<sup>413</sup> what obligations states owe when withdrawing from armed conflict,<sup>414</sup> state responsibility for military acts which cause civilian harms outside of an armed conflict,<sup>415</sup> and the appropriate scope of international organizations' accountability.<sup>416</sup> They also include questions relating to the relationship between international humanitarian law and non-state armed groups, including when “unwilling and unable” states should be held accountable for not preventing the acts of otherwise unaffiliated non-state actors<sup>417</sup> and whether organized armed groups should enjoy the privileges and be subject to the obligations the law of armed conflict imposes on states.<sup>418</sup>

Fully answering these internal and external questions is a project for another day (and, ideally, for a diverse assembly of people with far more expertise, diplomatic skills, and institutional power).

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<sup>412</sup> Crootof, *Implementing War Torts*, *supra* note 35. Answering many of these questions involves tradeoffs and balancing ideals against practicalities. For example, I argue that a war torts regime will generate information about civilian harms in armed conflict, which in turn will indirectly foster safer practices. See *supra* Section II.C.1–2. But a regime’s info-generating capabilities will be directly related to how developed it is, which in turn is inversely related to how likely it is to be established. Crootof, *Implementing War Torts*, *supra* note 35 (manuscript at 7) (discussing this and other tradeoffs in greater depth).

<sup>413</sup> E.g., DUSTIN A. LEWIS, GABRIELLA BLUM & NAZ K. MODIRZADEH, *INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT* (2017).

<sup>414</sup> E.g., Paul Strauch & Beatrice Walton, *Jus ex Bello and International Humanitarian Law: States’ Obligations When Withdrawing from Armed Conflict*, 914 INT’L REV. RED CROSS 923 (2020).

<sup>415</sup> See, e.g., Farnaz Fassihi, *Iran Says It Unintentionally Shot Down Ukrainian Airliner*, N.Y. TIMES (Jan. 14, 2020), <https://www.nytimes.com/2020/01/10/world/middleeast/missile-iran-plane-crash.html> [https://perma.cc/RP79-C7E9].

<sup>416</sup> E.g., Fleck, *supra* note 33, at 188–90.

<sup>417</sup> E.g., Paulina Starski, *Right to Self-Defense, Attribution and the Non-State Actor*, 75 MAX PLANCK INSTITUTE 455, 479–81 (2015) (arguing that a state is only liable for the acts of non-state actors when it controls its territory and does not exercise appropriate due diligence to prevent a terrorist threat).

<sup>418</sup> E.g., Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 491, 492 (2006) (observing that recognition regimes which attribute the actions of non-state actors to states have been replaced by compulsory rules of international humanitarian law which apply to all parties to a conflict when fighting reaches a certain threshold).

## CONCLUSION

After dozens of Kosovar refugees were killed in a mistaken bombing during the 1999 NATO air campaign in Yugoslavia, a retired Army reserve colonel commented, “We’ll have all our generals and NATO out there saying we’ll do everything to make sure this doesn’t happen again, but don’t count on it.”<sup>419</sup>

States continue to engage in armed conflict, and civilians continue to suffer the consequences.<sup>420</sup> Extant accountability regimes have failed to provide meaningful redress for civilian wartime harm: International criminal law and the law of state responsibility are only concerned with violations and do not establish a right to an individualized remedy, while domestic law employs a host of doctrines and privileges to block tort suits.

Recognizing that civilian harm is an inextricable part of armed conflict doesn’t require excusing it. Justice could be better secured by creating a war torts regime to increase the likelihood of victim compensation, encourage states to take steps to reduce civilian harms, and further the law of armed conflict’s foundational purpose of minimizing needless civilian suffering.

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<sup>419</sup> Ann Gearan, *Accidents Won’t Slow NATO Mission*, ASSOCIATED PRESS, Apr. 16, 1999.

<sup>420</sup> E.g., Khan, *supra* note 9; Dave Philipps, Eric Schmitt & Mark Mazzetti, *Civilian Deaths Mounted as Secret Unit Pounded ISIS*, N.Y. TIMES (Dec. 12, 2021), <https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html> [https://perma.cc/VRG6-PPFM] (describing how, while launching tens of thousands of bombs and missiles against the Islamic State in Syria in 2014–2019, an American strike cell “sidestepped safeguards and repeatedly killed civilians”); Dave Philipps & Eric Schmitt, *How the U.S. Hid an Airstrike that Killed Dozens of Civilians in Syria*, N.Y. TIMES (Nov. 13, 2021), <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html> [https://perma.cc/YH66-P4DC] (describing a 2019 U.S. strike on approximately 70 civilians).